UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, MICHIGAN,	.	Docket No. 13-53846
	.	Detroit, Michigan
	.	January 13, 2014
Debtor.	.	9:13 a.m.

. . . .

EVIDENTIARY HEARING RE. MOTION OF THE DEBTOR FOR A FINAL ORDER PURSUANT TO 11 U.S.C. SECTIONS 105, 362, 364(c)(1), 364(c)(2), 364(e), 364(f), 503, 507(a)(2), 904, 921 and 922 (I) APPROVING POST-PETITION FINANCING, (II) GRANTING LIENS AND PROVIDING SUPERPRIORITY CLAIMS STATUS AND (III) MODIFYING AUTOMATIC STAY (DKT#1520)

MOTION OF THE DEBTOR FOR ENTRY OF AN ORDER (I) AUTHORIZING THE ASSUMPTION OF THAT CERTAIN FORBEARANCE AND OPTIONAL TERMINATION AGREEMENT PURSUANT TO SECTION 365(a) OF THE BANKRUPTCY CODE, (II) APPROVING SUCH AGREEMENT PURSUANT TO RULE 9019, AND (III) GRANTING RELATED RELIEF (DKT#17)

CORRECTED MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING THE ASSUMPTION OF THAT CERTAIN FORBEARANCE AND OPTIONAL TERMINATION AGREEMENT PURSUANT TO SECTION 365(a) OF THE BANKRUPTCY CODE, (II) APPROVING SUCH AGREEMENT PURSUANT TO RULE 9019, AND (III) GRANTING RELATED RELIEF (DKT#157)

BEFORE THE HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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THE CLERK: All rise. Court is in session. Please be seated. Case Number 13-53846, City of Detroit, Michigan.

THE COURT: First, my apologies for being late. Are we ready to proceed with the closing arguments?

CLOSING ARGUMENT

MR. ELLENBERG: If the Court please, Mark Ellenberg, Cadwalader Wickersham & Taft, representing Merrill Lynch and speaking today on behalf of both of the swap providers.

Your Honor, this morning I'd like to focus on certain aspects of the settlement which I think deserve a little more attention than they've gotten in the hearing so far and also talk about some apparent misconceptions about the swaps, but the bottom line is that there is no genuine question that the settlement agreement is extremely beneficial to the city, particularly given the alternatives, and that it is, accordingly, well within the zone of reasonableness.

I'd also like to note at the very beginning that we're very aware of what's at stake in this case and that the case is going to have an impact on the city and perhaps on other parties, and we've been very careful to manage our relationship with the city with those broader interests in mind. And specifically in both 2009 and 2013 we attempted an orderly and cooperative resolution with the city rather than the reflexive exercise of remedies, and, indeed, today we

remain the only party in this courtroom who has managed to reach an agreement with the city.

The first key point I'd like to make about the settlement is that the swap counterparties can always look to insurance. FGIC and Syncora have fully guaranteed the payment obligations of the service corporations under the swap agreements. The swap counterparties would not rationally agree to a settlement with the city that results in a recovery lower than their recovery from the insurers, and the city recognized this. And it is notable that the policies waive any of all defenses both at law and in equity. Thus, even if the liens were not valid, even if the swaps were not valid, even if the COPs were not valid, we're entitled to collect each periodic payment from the insurers if the service corporations fail to make them.

That would give us a floor of approximately 65 cents, and the only reason it's not 100 cents is because FGIC is in rehabilitation. This means that the city effectively pushed us to the lowest number that we would ever accept. And parenthetically, as of Friday, interest rates are down a bit from where they were on December 23rd, and so the city's decision to lock the payment at 165 is actually favorable to them at the moment. Had they continued to float it, it would be slightly higher today.

The second key point I'd like to make is that the

insurers were called upon -- if the insurers were called upon to make swap payments to us, they would be subrogated to our right -- our rights, including our right to trap the casino revenues. We've seen this movie before. Syncora attempted to trap the casino revenues even before they had subrogated to our rights. The FOTA, the settlement agreement, eliminates the subrogation claims of the swap providers -- of the monolines, rather, because the swap providers have agreed that they will not make any claims under their policies once the settlement agreement becomes effective. This provides the insurers with a free release from all of their obligations under the swap insurance policies. The city asked for this, and it's of great benefit to the city. First, it eliminates the threat of trapping that was just discussed, and, second, by giving the insurers a release of the swaps for free -- normally an insurer pays for a commutation of insurance liabilities. They're getting it for free, and that effectively frees up additional resources for the city to take advantage of in plan negotiations.

The third point I'd like to make is that there were strong rationales for the swaps once the COP structure was decided upon. Prior to the COPs transactions, the city had failed to meet its obligation under state law to fund certain pension obligations. It was required by state law to fund that obligation with interest. The COPs were a means by

which the city could meet that legal obligation, and they ended up providing $1.4 billion in cash to the pension plans. The COPs transaction, thus, did not increase the city's obligations. It merely was a method for meeting an obligation that the city already had.

It's also very clear that the city completely understood the transactions it was entering into in 2005, 2006, and 2009. The transactions were thoroughly debated by the City Council, and, indeed, the City Council ultimately passed ordinances permitting the transactions to go forward and authorizing the liens that were granted in 2009. The city was represented by Michigan bond counsel, Lewis & Munday, and special swap counsel, Orrick Herrington. Also, in each case the city had two independent outside financial advisors, one for the COPs aspect of the transaction and a separate one for the swaps. And, finally, there was an extensive legislative authorization process and unqualified opinions covering the authorization, validity, and enforceability of the liens, including in 2009 the lien on the casino revenues, were granted.

The swaps were entered into in conjunction with this COPs financing, and the floating rate protected by the swaps was, indeed, the city's idea. What the public record shows is that the decision to issue floating COPs in 2005 was --

THE COURT: I'm not sure why you're telling me all

of this.

MR. ELLENBERG: I think, your Honor, because the agreement -- the transaction has been heavily criticized during the hearing, and it's -- that criticism is being used to attack the validity of the transaction and, therefore, the validity of the settlement agreement.

THE COURT: So, what? Merrill Lynch is doing this out of the goodness of its heart?

MR. ELLENBERG: I didn't say that, your Honor. Obviously we have a self-interest in achieving the outcome we're achieving, but we are doing it responsibly and in a way that is not only good for us but good for the city. There is such a thing as a win-win transaction, and there is such a thing as the lesser evil --

THE COURT: Okay. So argue that.

MR. ELLENBERG: -- and that's what we're trying to reach. But the ultimate point, your Honor, is that the swaps fully, completely, and effectively protected the service corporations and derivatively the city from interest rate risk. The swaps fix the floating rate -- turn the floating rate into an effective fixed rate of approximately six percent, which is in the stipulated facts at pages 8 through 9, and that was always true. It was true when they entered into the swaps. It was true the day they went into bankruptcy.

THE COURT: Termination fee have that effect, sir?

MR. ELLENBERG: The only aspect of the swap which changed with interest rates was the termination fee, but the termination fee is only payable if there's a termination. The amount --

THE COURT: So the answer to my question is no?

MR. ELLENBERG: Well, the amount the city paid on the COPs never changed. The termination fee did change based on interest rates. Sometimes it was in the city's favor; sometimes it was not. But the reason for entering into the transaction was to fix the interest cost associated with the COPs, and the swaps fully and completely did that.

THE COURT: Well, let's just nail this down.

MR. ELLENBERG: Right.

THE COURT: Is it your position that the city's present termination liability, whatever it is, 200 million give or take a little bit, has the effect of fixing, to use your word, the interest rates?

MR. ELLENBERG: No, your Honor. The swap transaction itself is what fixed the rates. The termination payment arises only because a termination event has occurred. That is an aspect of the transaction, but it's not the purpose for which it was entered into.

THE COURT: So it's of no economic benefit to the city?

MR. ELLENBERG: The termination payment, no, is not of economic benefit to the city, but the overall transaction was.

THE COURT: And yet by this settlement it's to be paid or at least a good portion of it.

MR. ELLENBERG: Yes, your Honor, because the city made a decision to take the benefits that the swaps did give them, and this was part of the transaction. And the additional point, your Honor, is that this --

THE COURT: I raise this because you said this here today, and you said it during the trial that the purpose of the swaps transaction was to fix interest rates.

MR. ELLENBERG: Yes.

THE COURT: And to some extent, that's true, but to a great extent it's also not true. And I want -- and I want the public to understand that.

MR. ELLENBERG: Well, your Honor, it fixed the interest cost. It absolutely did that.

THE COURT: To some extent it did.

MR. ELLENBERG: Yes. When you view the COPs and the swaps together, the effect was absolutely to fix the interest rate cost. When there's a termination event, then this additional liability arises. There's no question about that. But it should also be noted that the COP -- the swap providers themselves hedge the interest rate risk that they

took on through the swap agreement. That is what traders do. And so any payment they received from the city, they simply passed on to their hedge, and the termination agreement itself, your Honor, is not profit as it's been characterized here. It's to compensate the swaps -- the swap providers for having to replace the hedge when the city terminates the swap agreement because at that point they become unbalanced. And if we could pull up City Exhibit 1 for just a minute and go to page 12 --

THE COURT: Is it on your screen?

MR. ELLENBERG: Yes.

THE COURT: Okay. What do I need to get this screen functional? Turn it on?

UNIDENTIFIED SPEAKER: Yes. Reboot.

THE COURT: Okay. We're all set.

MR. ELLENBERG: All right. If we go to page 12, which is up, and look at the definition of market quotation, you will see -- is there a way to blow that up? You will see within that definition in parentheses the term "replacement transaction." And what the definition says is that quotes are to be obtained to obtain the cost of entering into a replacement transaction, and that's what the termination payment is. It's compensation to the swap providers for the loss they incur when the city end of the swap is terminated because it leaves them with an unbalanced book. It's been

described in this case as profit. It is not profit to us. It's what we need to do to cover, in essence. It's analogous to the UCC concept of cover. We have to get back into balance by replacing the trade. And, indeed, your Honor, that is why there are safe harbors in the Bankruptcy Code because swaps don't exist on an island in isolation. They are always part of a chain of transactions, and the concern of Congress was that there would be a domino effect on the entire chain from the default of a single party.

The next point, your Honor, is that the swap providers did an appropriate credit analysis when entering into the swap agreement. When the swaps were entered into, the swap providers considered the ability of the service corporations to pay them, and if you look at page 22 of the offering circular put into evidence by Ambac, you will see the rating shown with insurance and without insurance, so everyone was -- had a full credit analysis in front of them. And even though the city was investment grade, both the swap providers and the city determined that credit enhancement would be necessary to make the transactions viable. Accordingly, FGIC and Syncora were called upon to issue policies of insurance, which they did, and they were both rated AAA at the time. The insurance not only protected the swap providers, it protected the city and the service corporations against the city's own credit. As the swaps

were written in 2005 and 2006, they contained a double trigger for termination. First, there had to be a downgrade of the insurers below A-. Only if there were an insurer downgrade would the city's credit rating matter, and, thus, in 2009 when the city's credit rating was downgraded, that only was a termination event because, in addition, the swap -- the insurance providers had also been downgraded. Even then the service corporations had 30 days to provide a replacement insurer. In lieu of that, they provided a different kind of credit enhancement. They provided the liens on the casino revenues.

The next point I'd like to make is that the objectors are attacking the settlement agreement only to serve their broader agendas with the city. Indeed, they recognize the value of this agreement to the city, and that's why they're trying to hold it hostage. They hope it's going to benefit them in plan negotiations.

Ambac is the sole objector to challenge the validity of the liens and the underlying transaction, and that depends entirely on disregarding the service corporations. This objection obviously runs into the teeth of the opinions that were given, as described by Mr. Orr during his testimony, and this is also not a unique structure. It's been used by other municipalities, including municipalities in Michigan, and, indeed, Ambac itself has wrapped a transaction that uses

service corporations for Dearborn Heights, and we cite to that in Footnote 21 of our statement in support of the settlement.

In addition, your Honor, this transaction would be protected by the safe harbors. Section 560 of the Code permits a swap participant or a financial participant to exercise its right to liquidate, terminate, or accelerate a swap agreement, and that right shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court. And there's no question that the security agreement itself is a swap agreement because the definition of "swap" in the Code includes not only the basic swap agreement but any collateral agreement or security agreement related to the swap agreement, so both the swap agreements and the collateral agreement are swap agreements within the meaning of Section 560 and Section 362(b)(17), which is the removal of the automatic stay with respect to termination and setoff.

Now, Ambac has questioned whether perhaps the safe harbor applies because they suggest that the swap providers did not have their swap directly with the city, and, therefore, they don't qualify as swap participants under the Code. Well, first of all, they're also financial participants, but aside from that, for the reason I just said, the collateral agreement itself is deemed a swap

agreement for purposes of the Code, so that really is a nonissue.

Ambac also relies very heavily on the Enron decision issued by Judge Gonzalez, but that's really a very narrow decision. That doesn't remotely support the broad proposition that they're urging. The sole question in Enron was whether a payment by the debtor to redeem its own stock within 90 days of the petition was a settlement payment that would be immunized from preference avoidance under Section 546(g) of the Code. What the Court found was that since the debtor was insolvent at the time of the payment, under applicable state law it was an improper dividend because dividends should not be paid when a company is insolvent, and a payment to redeem stock is a dividend.

The important point is that under Section 546(g), you have to find there is a settlement payment. And the Code definition of "settlement payment" is very vague, and it depends -- it's a circular definition that depends on the market understanding of the term "settlement payment." And the Court concluded that the market doesn't have an expectation that illegal dividends would be settlement payments. The question here would be completely different. It would be whether this is a swap agreement within the meaning of Section 560 and Section 362(b)(17). There is no ambiguity in the definitions involved there. They're black

and white, they've objective, and the swap agreements and the collateral agreement clearly fit within those depositions (sic), so the issue addressed in Enron really is not applicable here at all.

THE COURT: So your position is that even if the Court were to find that the entire transaction were -- was illegal under state law, this Court would be powerless to grant any relief resulting from that finding?

MR. ELLENBERG: Yes, your Honor, because --

THE COURT: How about in state court?

MR. ELLENBERG: Absolutely not. That would be preempted, your Honor, and --

THE COURT: No court anywhere has the authority to hold an agreement or a transaction illegal under state law if it involves swap agreements.

MR. ELLENBERG: You could find it illegal, your Honor. What you couldn't --

THE COURT: I'm sorry. You could what?

MR. ELLENBERG: You could find it illegal. What you -- or void. What you couldn't do is find it -- what you couldn't do is enjoin our rights under Section 560 and Section 362(b)(17), and that's because --

THE COURT: Rights arising from the transaction found to be illegal under state law?

MR. ELLENBERG: Yes, and that's because, again,

Congress was --

THE COURT: That's quite extraordinary.

MR. ELLENBERG: I understand, your Honor, but Congress was concerned about the contagion effect, which would flow --

THE COURT: About what?

MR. ELLENBERG: The contagion effect, the domino effect, that would flow from the disruption of a link in the chain.

THE COURT: More concerned about that than the illegality of the transaction?

MR. ELLENBERG: Your Honor, it's a very broad statute.

THE COURT: Your answer to my question is "yes"?

MR. ELLENBERG: Yes. And, of course, your Honor, as Ms. Ball noted in her closing, this trial is not a trial of these particular issues. It's about what the issues are. This is the argument we would make.

THE COURT: Right. Okay.

MR. ELLENBERG: And the final point I want to make about that, your Honor, is that throughout all its arguments Ambac ignores again that we have FGIC and Syncora backing us up, and, thus, our floor is 65 cents. Even if all their arguments were correct, that's where we end up, and that goes to whether this is a reasonable settlement agreement.

Last, your Honor, I'd like to address the objections of Syncora and FGIC, which are based on what they assert to be consent rights over our ability to terminate the swaps. The first point is that everyone in this case seems to agree that that issue needs to be decided as part of this hearing. It's one of the few things everyone here seems to agree on, and we certainly agree with that. It would not make sense for the Court to approve this transaction and then find out that the city couldn't, indeed, execute it because of Syncora or FGIC's consent right. And I have to say that the arguments put forward with respect to the consent right are barely colorable. In fact, I'm not sure they're colorable at all. First of all, we're using the optional termination provision in the swap agreements, a provision that was added in 2009 and specifically consented to by the insurers. And they actually concede in Section 23 of the stipulated facts that on its face that optional termination provision does not give them a consent right. There are other terminations where they did have a consent right before they were downgraded, but this one doesn't give them a consent right, and the gyrations they go to to try and import a consent right into a provision that clearly doesn't give them one I just don't think are colorable, your Honor. We've gone over them extensively in the brief. I don't want to repeat them here, but I just -- I hate to use the word "frivolous"

because I think lawyers overuse it, but I really have to say in this case I think their consent right arguments are frivolous.

So, again, your Honor, I think when this is viewed as a whole and when the alternatives are considered, this transaction is absolutely in the best interest of the city, is well within the range of reasonableness, and it should be approved. Thank you.

THE COURT: Thank you, sir.

MS. ENGLISH: Good morning, your Honor. Caroline English from Arent Fox on behalf of Ambac Assurance Corporation. Before I begin, I would like to give the Court a little bit of a road map of what we have planned on our side of the courtroom here.

THE COURT: Okay.

MS. ENGLISH: As you know, we have many objectors here, some who are aligned and some who are not necessarily aligned. Our briefs all set forth the arguments that we believe lead to a conclusion that this motion should not be approved. We have some different arguments, some overlapping arguments. We've tried to organize ourselves so we don't duplicate, and, therefore, we sort of assigned point people, if you will, on the various arguments.

I'm going to begin this morning, and I'm going to begin with an overview of the evidence that came in on the

swaps portion, the swaps settlement, and then I'm also going to be arguing the two state law issues, one, that the swap obligations are void ab initio under Act 34 and, two, that the liens of the swap counterparties are void because they did not comply with the Gaming Act. Then Mr. Gordon will take it over from me, and he will be focused on the Bankruptcy Code-related claims, that there is no lien on the post-petition acquired casino revenues and the arguments of special revenue, special excise tax, et cetera. After Mr. Gordon, Mr. Perez will be arguing on more fact-related issues, issues specific to the swaps insurers, including consent rights, order and release issues, and 365 issues. Mr. Perez will also transition us into focusing on some DIP arguments. Specifically, he'll be addressing the good faith finding that needs to be made. Then Mr. Marriott will be addressing the Court with respect to issues under 364(c) and Public Act 436. After that Ms. Green will have a short presentation with respect to the proposed order on the DIP financing, and then Mr. Bennett will be speaking with respect to prudential concerns and the best interest of creditors. Following Mr. Bennett, Mr. Goldberg will be speaking with respect to the issues that have been raised in the David Sole objection, and following that we have reserved some time for any other objectors who need a few last-minute words.

We have, your Honor -- as of Friday's count, we had

207 minutes left. We have structured this down to 205 minutes, so if all goes according to plan, we're going to get out of here two minutes early.

THE COURT: Okay.

MS. ENGLISH: I think, your Honor, we've passed up my PowerPoint deck, and it should be also on the screen hopefully in front of you. Our trial consultant has given me the clicker, so we'll see if I can be so technologically inclined this morning.

CLOSING ARGUMENT

MS. ENGLISH: All right. In overviewing the evidence that we heard come in over the three days of trial testimony, we think it is clear that the evidence showed that this deal was done very hastily, and hasty decisions don't make for the best judgment, and they don't make for the best results. Mr. Buckfire testified he was under extraordinary time pressure. In fact, they did this deal in one week's time. They opened negotiations with the swap counterparties on June 4th, and they had a deal on June 11th. Mr. Buckfire also testified that he went into these negotiations with, quote, "not very good cards to play." You know, your Honor mentioned at one point in the trial that the city needs to stop acting with a gun to its head. We feel this is just another example of that kind of decision-making. The city panicked. They thought they were in dire financial straits.

They might run out of money very soon. This was a bad deal that they were in, and they wanted to get out of it, so they leaped forward into negotiations in a panic mode. And doing a deal quickly, again, does not make for the best judgment, and the result, frankly, reflects this.

Now, let's look at -- Mr. Buckfire said that he didn't have very good cards to play when he went into the negotiations. Let's look at what his cards were. This is testimony from the official trial transcript. He said he thought the swap counterparties could trap the casino revenues. He said he thought the swap counterparties were secured, they had secured rights. He said he went in under the assumption that the swap counterparties had valid liens. When he was asked about what claims the city had, what were the arguments, the legal arguments that the city had to argue against the swap counterparties' positions, he didn't know what they were. He testified he didn't even know if an evaluation of those claims had been done. He went into these negotiations completely unprepared. He was unarmed. He was handicapped from being able to negotiate with the swap counterparties aggressively. And this problem was exacerbated in the negotiations by the fact that Mr. Orr deferred completely to Mr. Buckfire. He testified on cross-examination he sent Mr. Buckfire into these negotiations. He hadn't had a conversation with him about the legal positions

and the arguments. Sent him and said, "Get the best deal you can." Mr. Buckfire goes in, a week later comes out and says, "This is the best deal I can get. Let's go with it."

The evidence revealed that there was not a serious consideration given to a litigation strategy. Mr. Malhotra testified that Ernst & Young was never asked to run cash flow analysis that showed a litigation strategy, and Mr. Orr confirmed that they never asked Mr. Malhotra or Ernst & Young to do that. Now, in her closing argument, Ms. Ball suggested that there was, in fact, a cash flow analysis that was run showing a litigation strategy, and what she pointed to was -- I think it was Exhibit 111 that showed the three lines going across, right, that Mr. Malhotra testified to. What did those three lines show? The first one showed DIP financing and a settlement. Second line showed no DIP financing, no settlement, no trap. Third line, no DIP financing, no settlement, cash trap. Where was the line that showed DIP financing, no settlement? It's the fourth obviously missing line on the chart. What has happened here is the city tied in their minds the idea of post-petition financing to getting the swaps deal done. Ms. Ball mentioned also in closing argument that, in fact, the city believed the casino revenues -- freeing up the casino revenues by doing this deal was critical to getting post-petition financing. Where was the evidence on that? Nobody testified to that,

Mr. Buckfire, Mr. Malhotra, Mr. Doak, Mr. Orr. Nobody testified that freeing up the casino revenue was going to be necessary to secure DIP financing in bankruptcy nor are there any documents that show this would be necessary, and, in fact, when they went out to look for post-petition financing, they got several proposals from several banks offering post-petition financing not secured by casino revenue but secured by income tax revenues and asset proceeds. Proof is in the pudding. There was no need to free up the casino revenue to get post-petition financing. There was no need to link these two together. The problem is the city managers didn't have before them the documents they needed to show that litigating was a real possibility. They were just moving too quickly, and they weren't thinking through all of the options that were available to it.

Now, I want to show you the analysis that the city didn't do. I'm not an accountant. I don't run cash flow analyses. But this analysis comes straight from the evidence that was put forth at trial. Remember the original deal here. The original deal is $350 million in DIP financing; right? 230 million of that was for the swaps, to terminate the swaps, and that was going to be secured by income tax and asset proceeds, 230 million. And the other piece of it was 120 million for reinvestment. That's going to be secured by casino revenues. They call that the quality of life portion

of the loan so that it fits within the authorized uses under the Gaming Act. And, as I said, we know that they did get several offers in, including the Barclays deal that they agreed to, that included $230 million secured by income tax and asset proceeds.

Now, on the left side of my screen here is the proposed settlement that we have today. We are now looking at post-petition financing of 285 million, and the reason that's come down from the original 350 is because now we're looking at a swaps portion of this that's 165 million. The 120 million for reinvestment has stayed the same. if we back out of that the swaps-related cost of this financing, we back out the 165 million, the result at the bottom there is they're going to have 120 million to spend on their reinvestment programs.

Now let's look at the right side of the screen. The city has demonstrated they can get financing to the tune of $230 million secured by income tax and asset proceeds, so let's assume that's what they get in their post-petition financing, just that portion of the Barclays loan. Let's assume that they don't get the other $120 million portion because maybe the banks aren't going to be willing to loan as long as the casino revenue is tied up in litigation; right? So let's assume they just get the 230. Now let's back out of that the swaps-related cost. Well, the swaps-related cost in

this scenario is the cost of litigating. Mr. Orr testified they were budgeting -- maybe it would cost them a million dollars a month to litigate these issues. Now, I'm going to come back to this. I think that's not credible, and we'll talk -- I want to talk a little bit later about the litigation costs and our assessment, but let's just assume for right now that it's going to cost them a million dollars a month to litigate these issues, and it's going to take them six months to do it, $6 million. You back that out of the 230, and now we've got $224 million to spend on reinvestment and to provide extra liquidity for the city. The city comes out better. And even my little asterisk at the bottom, let's credit the city's argument that they are concerned the cash might get trapped, the casino revenue might get trapped during litigation. Now, I'm going to come back to this a little bit, too. I think that's, frankly, not a realistic fear. I think the city would be able to get an injunction that preserved the status quo and didn't have the casino revenue trapped, but let's say I'm wrong. Let's say the casino revenue gets trapped during the course of that litigation. That's $15 million a month in casino revenue over six months. We're talking $90 million. Let's back that out of the number. Now we're looking at a result of 134 million to spend on reinvestment and liquidity, still more than on the settlement side. Again, this is the analysis

that we see no evidence that the city ever did.

THE COURT: Where does the six months come from?

MS. ENGLISH: Six months is our estimate. Your Honor, the Bankruptcy Court has shown it is able to move through these issues presented, weighty issues, very expeditiously. The arguments that we are talking about raising in a litigation are pure legal issues. They could be resolved on summary judgment. They would require no discovery. We think six months on the outside is the length of time it would take to try this case.

THE COURT: So not including appeals obviously?

MS. ENGLISH: Correct.

THE COURT: So under this analysis, if the city is going to settle instead of litigate, looking at the numbers here, there's got to be a reasonable and a credible assessment that the claims have significant vulnerability if they're actually going to settle and get to these numbers that are worse, so that begs the question. Was there a credible assessment done of the city's legal arguments? We heard Orr testify that he did no independent assessment of the claims. He did not independently analyze any of the legal claims or the defenses. The totality of his testimony is what his attorneys told him their assessments were.

Then we have the issue where the city claimed the attorney-client privilege, so we have Orr's testimony as to

what his attorneys told him, and we have no underlying documents. We have no way to test the testimony, no analyses that were provided. All we got was a privilege log that covers only, quote, selected documents, says right on the title, only selected documents that the city chose to log. Notably, those documents include not a single document that shows as going to Mr. Kevyn Orr. The log shows only five e-mails over a ten-month period, March to December. Is it credible that Mr. Orr actually received analyses from his lawyers that walked through the legal claims and the defenses, and he used those analyses to inform the negotiations?

Mr. Orr also testified that he viewed every single claim that could potentially be raised -- and I think he testified to four independent claims -- every single one, in his mind, was a -- was 50-50 odds. It was a toss-up. If we believe Mr. Orr that the claims were truly assessed as having 50-percent odds of success, we've still got a problem, and that problem is that the settlement they've done, the deal they've cut, doesn't reflect 50-50 odds. Now, first, as sort of a footnote, we've got four independent claims here. If it's true that we've got 50-50 odds on each of them times four each -- any of which alone would invalidate the swap transactions, it's not really that bad odds. Does it justify a settlement that is now looking at 60-, 70-percent on the

dollar?

So let's, again, take Mr. Orr's testimony. He believed that the assessments were 50-percent chance of success, so in June what happens? Mr. Buckfire goes into the negotiations and starts at 50 percent and negotiates up. That doesn't reflect the legal assessment here. The original deal they cut was at 75 percent. That's 25 percent higher than how they assessed the merits of their claims. And then, your Honor, you indicated to them 75 percent seemed a little high, sent them off, renegotiate, cut a deal that more -- is more tailored to the assessment of the legal claims and defenses here. So what happens? They go into the negotiations, and now they're beginning at close to 60 percent. Mr. Orr testified that he believed he was starting somewhere in the range of 50 to 60 percent. The number he was using in his head was roughly 150 million. As of the date he's negotiating, that's 59 percent. That's where he starts, and then he goes up. He ultimately gets to a number for the new deal at 62 to 62 -- 3 percent is what he believes. We're still looking at a number that doesn't match their assessment of the claims. We think this history of negotiations shows that they were trying to get a deal done at any cost. They were trying to check off the list.

THE COURT: Okay. Let me pin you down --

MS. ENGLISH: Sure.

THE COURT: -- with a number. What do you think was the highest reasonable number to settle with the swaps?

MS. ENGLISH: That is putting me on the spot now, isn't it, your Honor? Can I say it's a hundred percent? It's a slam dunk? Probably not. Nothing is a slam dunk in the world of litigation, is it? But the truth is -- and I'm going to be walking through two of these claims, and then Mr. Gordon is going to walk through of them -- through several of them, and we think they are very, very strong. I would have to give them very, very high marks, certainly not 50 percent, not even 75 percent, your Honor. I would give them a mark higher than that. These are very strong, very clean issues.

THE COURT: What's your number?

MS. ENGLISH: I'm not going to give you a number, your Honor, and I know you respect me for that. Okay. I want to look just for a minute here specifically at the December negotiations. Okay? The city basically put itself in a box in June. It did the deal really fast, got the best deal they thought they could get, weren't really armed in the negotiations, came out with 75 percent. The problem is that when your Honor sent them back into negotiations in December, they just couldn't pull themselves out of that box, and, in fact, they didn't really try. Mr. Orr did not go into those December negotiations armed to bear, ready to refight the fight, ready to negotiate as best he could. He didn't take

that time between the 18th when we recessed and the 23rd when he went into mediation and pull together -- get his legal ducks in a row, pull together the analyses, review the liability that he was facing and get ready to go in there. He wasn't armed. He wasn't prepared. He still hadn't requested or reviewed any cash flows with the litigation strategy. He still hadn't requested or reviewed an interest rate analysis so that he could forecast termination payment liability. He testified quite clearly he didn't actually even know the current termination liability that the city was facing on the day he was negotiating. That to me is a big problem if you go into negotiations and don't even know your potential liability that you're negotiating against.

Then we have this change from the percentage deal. First we were looking at a discount of 25 percent. Now we're looking at a fixed number, 165 million. This removes the city's ability to take advantage of interest rates which Mr. Orr agreed are, generally speaking, on the rise, and so by switching it out from a percentage deal and now looking at a fixed fee deal that's going to close by the 31st, potentially this new deal could be the same as the old deal, could even be worse, and let me show you what I mean by this.

First of all, I want to point out that the number in the bottom right of the screen that shows a number for January 31st is a hypothetical number. That's not a real

number. None of us knows what the number is going to be on the 31st, so I don't want to mislead anyone with that, but I do want to walk through a possible result here, so let's look at the first line, the one that starts way over on November 29th. This is a stipulated number in the record. The city has stipulated that as of November 29th, the total termination payment liability was $277.7 million. Then if we look at the next number, December 10th, this number comes out of the city's supplement to its motion where it argues that the $165 million it's agreed to is 62 percent of the total termination liability as of December 10th, so that would make that number, easy math here, 266 million. If we just look at that trajectory there, we've got a loss of roughly a million dollars a day, and if we follow that down, if that were to remain the current trend, follow that down to January 31st, we're going to be looking at a total termination payment liability of 211.4 million, which at that point in time would make the $165 million deal 78 percent, 78 cents on the dollar.

Let's look at the second line. These two numbers are based on the recent stipulation that the city entered into. They stipulated that on December 23rd, the day that Mr. Orr was negotiating the new deal, the total termination liability as of that date was 256 million. That would make 165 million on that date roughly 64 percent. The city also

stipulated that on December 31st at the close of the year-end, the total termination payment liability was $247 million. That would render as of that date the 165 million 67 percent. Again, if we follow the trajectory down to January 31st, that line also ends up at a 78-percent figure. That line ends up with projecting a possible total termination liability of 212.1 million, and 165 million would be 78 cents on the dollar of that.

This causes us great concern. Again, we don't know what the number is going to be on January 31st, but the point is that by removing the percentage deal, the discount that was negotiated, we may have undone the good of the original deal and made it worse. That means also, of course, that, you know, Mr. Orr didn't assess this and doesn't know if this deal is going to be better, and we don't know if this deal is going to be better. And it means the Court also doesn't know if this deal is going to be better. How can the Court assess today whether this is a fair and equitable settlement of claims if the termination payment deal could be 62 cents on the dollar or perhaps it could be 78 cents on the dollar?

Now, I'm going to transition now to talking about the two legal arguments. This is the test under Rule 9019 which the Court is very familiar with. You know, Ms. Ball asked in her closing argument what is the city's burden. The city's burden is quite simply this. The city has to put

forth enough evidence, testimony, facts, documents, for the Court itself to make an independent and objective analysis as to the strengths and weaknesses of the claims that are being settled and, thus, to determine whether the settlement amount is fair and equitable. The Court well knows -- I don't need to tell you this, but the Court well knows it can't just rubber stamp what Mr. Orr wants to do or what the city wants to do. A fair and objective analysis must be done after looking at all the evidence. You have to say, your Honor, yes, settling these claims at 62 percent or 78 percent makes sense to me under the evidence that's in front of me. This represents a fair and equitable settlement.

Okay. These are the two claims I would like to discuss now, first that the swaps are void ab initio because they were unauthorized under Act 34 and, second, that the liens on the casino revenues are invalid and void ab initio because they were not authorized under the Gaming Act. As I mentioned, Mr. Gordon is going to speak to some of the other legal claims.

The Revised -- the Michigan Revised Municipal Finance Act, which we refer to as Act 34, specifically allows municipalities to enter into swap transactions, but in order to do so, it imposes a number of conditions and requirements on cities if they choose to engage in swaps. This is, of course, because swaps are widely recognized to be inherently

risky transactions. Among the risks is the fact that cities often don't anticipate or appreciate termination liability they may ultimately face. The state legislature imposed parameters on how cities can engage in swap transactions specifically so that they could mitigate and address some of these risks. Here the city, in undertaking the swap obligations back in 2005 and 2006, did not follow those requirements of Act 34. There's really no dispute as to this, so I don't intend to spend a lot of time on this because in none of their papers that the city filed or the swap counterparties filed do they dispute that Act 34 was, in fact, not followed.

The crux of the problem here goes to the structure of the transaction. Under Section 317(4) of the Revised Municipal Finance Act, in order to undertake a swap obligation, structurally it has to be done as a limited tax full faith and credit pledge or entered into in connection with a municipal security. Here the transactional documents themselves state they are not -- it's not a full faith and credit pledge. Moreover, the definitions set out in Act 34 for a municipal security don't line up here with the structure of the transaction.

Now, before -- just before I dive into the nitty-gritty of the argument, it's very important here that we understand the substance of the transaction, and the

substance is that it is inescapable that the city undertook swap obligations. Mr. Buckfire testified, quote, unquote, the city entered into swap transactions. Mr. Orr testified, yes, these are the city's swap obligations. I have up here on this slide some of the language out of the service contract, in particular, the highlighted portion under Section 8(c). The city will be obligated to make service payments in respect of hedge payables. The city was entering into swap transactions.

Now, there's two ways to look at this, two views of the world. Here's view number one. In the middle we've got the service corporations. As we know, the service corporations have swap contracts with the swap counterparties on the far right side of the screen. The city then, through its service contracts, took on mirror image swap obligations to the service corporations, so under this view of the world, the city has swap obligations that run to the service corporations pursuant to the service contracts.

There's a second view of the world. Here the service corporations are viewed as a mere pass-through. The swap obligations of the city actually are viewed as running to the swap counterparties, which really gives rise to why the city has brought this deal for your Honor's approval in the first place. They're doing a deal now to resolve the swap obligations that run to the swap counterparties.

Under either scenario, under either view, the city has swap obligations, and, therefore, it had to comply with Act 34. The service corporations here were basically used to do -- to accomplish something indirectly that the city couldn't do directly. If the city is going to take on swap obligations, it has to comply with Act 34. They can't -- the city cannot set up a service corporation to take on swap obligations and not comply with Act 34 if it's going to then bind the city to those swap obligations.

The city has argued, hey, wait a minute. Home Rule City Act allows cities specifically to set up service corporations. There's nothing unlawful about having a service corporation, and they're right. However, there is something very unlawful about having a service corporation and setting it up in this way to bind the city. The whole point of using service corporations is what we call off balance sheet financing. They take on their own obligations. They have their own sources of revenue, and they pay those, and those obligations are not run through the city. Here, if I can just go back -- whoops -- here's the problem on the left side of the screen, that left swap obligations arrow. Here the service corporations were engaging in their swap obligations with the swap counterparties but then bound the obligations back to the city. Mr. Orr testified specifically he knows the service corporations don't have any other source

of revenue. These are the city's obligations, and that's the problem with this.

Now, I want to address -- sort of pause for a moment and address the city's argument that there might be a bigger problem here, might not just be about the service corporations taking on swap obligations and putting them over on the city. It might be that the service corporations were used unlawfully to evade the debt limit, and that would render everything invalid; right? Now we're looking not only at the swap obligations. Now we're looking at the COPs as well. That's not the argument that is in front of your Honor today. In fact, the city has specifically preserved that claim that the COPs could potentially be invalid for another day. That's not being litigated here. So all of the smoke about, oh, my gosh, what if the service corporations were used unlawfully to evade the debt limits and it renders all of the COPs invalid, and before you know it this litigation is going to take on a life of its own. Now everybody on this side of the courtroom is going to be a defendant in this litigation. We're going to have claims. We're going to have counterclaims. We're going to have parties and counterparties, and before you know it, it's going to be huge. We've got to settle this right away because this litigation is going to be so messy. That's not actually what's being settled today. That litigation, if it happens

at all, that messy litigation, has been completely preserved for another day. That's not being released in this settlement. The only thing that's being released here are claims against the swap counterparties. Our only argument that we are asserting here today is that the swap obligations themselves are void ab initio because the swap transactions didn't comply with the swap requirements under Act 34.

Now, I want to just run through -- I believe there are -- we've basically heard four defenses. The claim is the swap obligations are void ab initio because they didn't comply with Act 34. We've basically heard in the evidence and sometimes not through the evidence but just from Ms. Ball's argument four potential defenses that the city says draw into question the strength of the city's legal claim and, therefore, makes it reasonable to settle. The first purported defense that they raise is service corporations don't have to comply with Act 34. They are separate and distinct entities. I think I've already sort of answered this defense. It's irrelevant because whether your view of the world is that the city took on swap obligations to the service corporations or to the swap counterparties, it's the city that still has swap obligations here that don't comply with Act 34. But even more to the point, the evidence doesn't bear out their argument. In neither the June negotiations nor the December negotiations were the service

corporations anywhere to be found. I mean Mr. Buckfire even testified he was still to this day unfamiliar with the service corporations. They weren't in the room. They weren't doing negotiations. Nobody even knows how -- whether and how they negotiated with any party or how they signed the agreement. To say that they are -- to conclude that the service corporations are not controlled by the city, not affiliated with the city, doesn't match up with the evidence that we heard.

The second purported defense raised to the claim that the swaps don't comply with Act 34 and are, therefore, void is that the city didn't actually have to comply with Act 34 because there's home rule power in the State of Michigan, and home rule allows it to take on swaps however it would like to. Well, home rule doesn't work that way. Home rule doesn't mean municipalities can do whatever they want to do. Home rule powers are specifically limited, and I've thrown up here just three bullet points, the Home Rule Charter, the Home Rule City Act, and the Michigan Constitution, all of which specifically say home rule is limited. It is subject to the Michigan state Constitution, Michigan state statutes. Act 34 is such a limitation on municipal power. It is a limitation that says if you're going to enter into swap transactions, great. Here's how you do it.

The question here becomes whether Act 34 preempts a

municipality's ability to enter into swaps under any -- in any other manner. We briefed this pretty extensively in our brief, and there's really been no arguments thrown up against it. These are the Llewellyn factors for preemption, and what's key to our case here are the second, third, and fourth bullets on the slide, whether preemption of a field regulation can be implied from the legislative history, whether the state regulatory scheme itself is so pervasive that it makes clear that it preempts a municipality -- municipal power, and whether the nature of the subject matter demands uniformity, and here all of these factors weigh in favor of a finding that cities cannot enter into swaps outside of Act 34. Act 34 was clearly put in place -- and the legislative history bears this out -- to protect the credit of the state and its municipalities. It prohibits a municipality from issuing debt or obligations except in accordance with Act 34. The legislative scheme is all-encompassing. The provisions are wide-ranging, and the supervision by the state is all-encompassing, and the act specifically includes a section on swap obligations. That section, Section 317, is itself all-encompassing. It imposes numerous prerequisites to entry into interest rate swaps, including specified terms that must be in the agreement, approval, review, compliance enforcement by the Treasury Department, adoption of debt and swap management plans that

incorporate analyses of risk and cost and benefits, reporting and disclosure requirements. This regulatory scheme is both so broad and so detailed that it's clearly intended not as an optional means for which a city could enter into swaps but the required means by which they can enter into swaps.

The subject matter also speaks to this. The purpose of Act 34 was to protect the credit and solvency of the State of Michigan as a whole by protecting its municipalities from entering into risky transactions. The notion that home rule might provide a defense to a claim that the swaps are void because they didn't comply with Act 34 simply lacks merit.

The third possible defense that's been raised to the claim that the swap obligations are void, this comes down -- this potential defense is the defense of estoppel, and it comes from Mr. Orr's testimony that there are countervailing facts basically. The city got a benefit from the swap obligations. There were City Council findings rendered when they entered into the obligations. There were legal opinions. All of these are facts that could potentially give rise to an estoppel claim. Notably, the city mentions this in its paper. The swap counterparties do not argue estoppel in their papers, interestingly. The problem here is it's black letter law that estoppel -- the doctrine of estoppel is wholly inapplicable to challenges that municipal acts are void ab initio or ultra vires, outside the municipal's --

municipality's authority. There's a Supreme Court case on point, Pullman's Palace, that talks about if a contract is ultra vires, it is wholly void, of no legal effect, and neither party, quote, "can be estopped by assenting to it or by acting upon it to show that it was prohibited by those laws." There's also Michigan state cases that say specifically the doctrine of estoppel is inapplicable to ultra vires acts, and those cases are cited in our brief, so there is no estoppel defense here whatsoever.

Finally, the fourth and last defense to a claim that the swaps are void ab initio is something that Ms. Ball spent quite a bit of time on in her closing argument, and we also heard this morning from the counsel for the swap counterparties. The idea -- I think your Honor said it this morning yourself. The idea that you could have a transaction that is rendered void, that is void under state law, that could, nevertheless, be not only enforceable but protected in bankruptcy -- I think you called it extraordinary, and I agree. In fact, I think it's kind of absurd, to be perfectly honest. I think this is a point of logic. If you have an obligation that under state law is void, a nullity, of no legal effect, then that same transaction, because you call it something, can't suddenly get protections in bankruptcy. And Judge Gonzalez in the Enron case -- notably, this is the only opinion on this point. The swap counterparties' lawyer said

this morning, you know, it's a very narrow holding. He's right. It is a very narrow holding, and it is directly on point to this case. Judge Gonzalez looked at the underlying transaction under Oregon law, and Oregon law was very clear that that transaction done in that manner was void under state law, and so he concluded where the transaction is rendered void by state law, it is a nullity, and the purpose of the safe harbor provisions cannot be implicated. The transaction is void. The treatment of the financial instrument is the result of state law voiding the entire transaction. If it is determined that the transaction violated state law, the agreement would be a nullity and have no legal effect. As a consequence, the transfer would not have been made under or in connection with the swap agreement and could not be protected from avoidance under the Bankruptcy Code.

Ms. Ball raised three cases in her closing argument out of the Eighth Circuit, the Northern District of Illinois, and the Second Circuit. None of these cases even remotely call into question the idea that a void transaction cannot be protected by the safe harbors. None of them call into question the reasoning of the Enron decision, and that's because in none of those cases was there even an allegation made that the underlying transaction was void under state law, none of them. I can go through those in more detail if

your Honor would like.

THE COURT: Well, I'm more interested in how you deal with the precise language of Section 560 of the Bankruptcy Code.

MS. ENGLISH: Well, the point is that if the swap transaction itself is void, okay, Supreme Court law and Michigan law say if you've got a municipal contract that exceeds the scope of municipal authority, that is ultra vires and, therefore, void ab initio, it's as though the transaction never took place, never happened. It is of no legal effect, so there is no swap agreement to protect. There are no swap obligations to protect under the safe harbor provisions. The swap counterparties have no legal position to be protected by the safe harbors.

So the question is could the city -- based on these four defenses, could the city have reasonably second-guessed the strength of the legal argument that the swap obligations were void ab initio based on these four defenses, which were the only defenses we heard about? Can the Court reasonably second-guess the strength of this argument based on these defenses? The bottom line is that none of these so-called weaknesses or roadblocks that the city has thrown up actually call into question the strengths of the -- the strength of the city's claim that the swaps are void. There are no facts in evidence and no argument made that Act 34 was actually

followed. There's no legitimate argument that the city could enter into swaps without complying with Act 34. The fact that the service corporations may be viewed as separate entities is irrelevant. The doctrine of estoppel is wholly inapplicable to claims of void ab initio, and the safe harbors in bankruptcy cannot save a void transaction that doesn't qualify as a swap in the first place. Without any meaningful defense, how could Mr. Orr say that this claim gets a 50-50 assessment, 50-50 odds, it's just a toss-up? How can the Court conclude that settling this claim at 62 cents on the dollar or maybe even 78 cents on the dollar is fair and equitable?

Now I'm going to move to my second argument, and that is that the liens on the casino revenue are also void because, just as the swap obligations were not entered into in accordance with the state statute, the pledge of the casino revenue was also not authorized by a state statute, and I'm talking specifically about the Gaming Act. The Gaming Act has a specific list of authorized uses of casino revenue. None of them involve financial obligations or collateralization of financial obligations or swap obligations.

Here's the list. Under the Gaming Act, casino revenue may be used only for hiring, training, deployment of patrol officers, neighborhood and downtown economic

development programs designed to create jobs, public safety programs, emergency medical services, fire department programs, street lighting, anti-gang and youth development programs, other programs designed to contribute to the improvement of quality of life in the city, relief to taxpayers, capital improvements, road repairs. Not a single one in that list that says hedge interest rates, collateralize a financial obligation.

What are the city's defenses here as to the argument that the pledge of casino revenue didn't meet any of those authorized uses? They have two. The first is that it's permissible under subsection little (v). That's the section that says other programs are designed to contribute to the improvement of quality of life in the city. Statutory construction dictates when you have items in a list like we do here and you see the first several there talk about programs, economic development programs, public safety programs, youth development programs, we're talking about community betterment programs, programs that provide services. Is this a program that provides for community betterment or services? No. It's a swap obligation to pay banks an interest rate.

Ms. Ball argued for the first time in her closing argument that, hey, look, the pensions are a program, so it can be an authorized use under this section because they're

related to the pensions. Notably, Mr. Orr never testified to that, not in deposition, not in trial, not a single piece of paper, not a single piece of evidence or testimony that shows this -- that was the defense that was considered that led them to their assessment of 50-50 odds. This came for the first time in closing argument from Ms. Ball. Notwithstanding that, the pensions are not the program here. There was no money in the swap obligations that was going to the Retirement Systems. Retirees weren't getting the benefit of this. This was swapping interest that the city was liable for under a financial agreement, didn't better off the retirees. This is not a pension program.

The argument that the city and the swap counterparties did mention in their briefs was that this is an authorized use of casino revenue in that it would improve the quality of life in the city because if they hadn't pledged the casino revenue in 2009, the city was facing massive liability, and that ultimately would trickle down, and it would affect the quality of life in the city. Your Honor, that, we respectfully submit, is just too attenuated. If you start to read the Gaming Act that any financial hit to the city might ultimately affect quality of life of the residents of the city and, therefore, might qualify as a quality of life improvement program, we should just -- it renders the entire Gaming Act meaningless. Having a list of

specified uses just gets thrown out the window.

As to the tax relief prong, that's the second defense they raise. Okay. Well, it's authorized under the factor that says you can use casino revenue to provide relief to the taxpayers of the city from one or more taxes or fees imposed by the city. We've not heard actually anyone seriously argue this defense, and I submit it's because the language of the statute is very clear. Use of casino revenue in this way must be to relieve taxpayers from a tax that's been imposed. There was no such tax that was -- that had been imposed and then was relieved by the pledge of casino revenue, so we submit that this use also doesn't work.

So here again, we've not heard any arguments that cast any meaningful doubt on the city's claims that the liens were unauthorized by the Gaming Act and, therefore, invalid or void, so we asked the question again. Is Mr. Orr's 50-50 assessment on this claim credible? Can the Court view the settlement that's been presented today as reasonable based on this claim that's being settled?

I've discussed on the two claims I've addressed that we believe the probability of success is high. I didn't give you a number, but fair to say we think it is very strong.

Let's look at what the rewards of litigation would be. If these two claims were successful, it would mean that the swap obligations are a nullity, void ab initio, no swap

obligations, and it would mean that there are no liens. The swap counterparties don't have any liens on the casino revenue. What does this mean for the city? It means the casino revenue cannot be trapped. It means the city is free to use its casino revenue for quality of life improvement programs and initiatives. It means the city is relieved from having to pay monthly swap payments to the swap counterparties. It means the city does not face any liability for a swaps termination payment, and it means that the swap counterparties will owe the city hundreds of millions of dollars. Mr. Orr testified to that. There's going to be a disgorgement claim if the city wins to get the swap payments back. This deal should have the swap counterparties paying the city, not the city paying the swap counterparties.

THE COURT: How much?

MS. ENGLISH: He keeps wanting a number from me. The swap payments were about $50 million a year, and this is stretching back a number of years. I haven't looked into the statute of limitations on this, but Mr. Orr agreed it would be hundreds of millions.

THE COURT: I won't press you on the number anymore, but where do the swap counterparties go if the city wins on all of this?

MS. ENGLISH: Well, I don't know the answer to that,

but if the swap obligations in the first place were void and of no legal effect, the result of that is that typically you unwind the transaction and restore people back to their original position.

THE COURT: Does that put the pension plans at risk?

MS. ENGLISH: Not on the swap obligations, your Honor, no, it doesn't. Pensions did not benefit in any way from the swap payments that were made.

THE COURT: Except indirectly as they supported the COPs transaction.

MS. ENGLISH: Again, your Honor, let's -- I don't want to get carried away here as Ms. Ball has done with the idea that we have to unwind everything and look at the COPs' validity right now. They're not settling that claim right now. They've reserved the ability to pursue that claim later. The only thing that's being settled is the swap obligation.

One of the factors the Court has to consider is the complexity, expense, and delay of litigating, of course. What's the tradeoff? If you don't settle, what are you looking at? And I think I touched on some of this earlier on. These are pure legal issues that we've presented. They require no discovery and could be resolved on summary judgment. We think they could be resolved very quickly in this court. We think an injunction in order to prevent the

swap counterparties from being able to trap the casino revenue during the pendency of the litigation is likely given that the probability of success on the merits is high and clearly the balance of hardships would tip in the city's favor, so ultimately we think the analysis comes out that the litigation cost would be relatively low given the nature of the issues. They can get their post-petition financing secured by income tax and asset proceeds just as they've shown they can do, which will support ample post-petition financing while they litigate.

Given the strength of the city's claims against the swap counterparties, we submit that the settlement on the terms proposed in the current forbearance agreement is far too rich. Moreover, we don't actually know what the settlement means. Mr. Orr doesn't know. We don't know. Your Honor doesn't know. It could be the 62 percent Mr. Orr thought it was. It could also be much more. By agreeing to a fixed rate without doing an interest rate analysis and without knowing what the termination payment is going to look like on January 31st, we've all been handicapped, and we submit that the Court can't conclude under these facts and circumstances whether this settlement is actually fair and reasonable. I think that'll conclude my presentation. Thank you.

THE COURT: Thank you.

CLOSING ARGUMENT

MR. GORDON: Good morning, your Honor. Robert Gordon of Clark Hill on behalf of the Retirement Systems.

THE COURT: Should I not press you for a number either?

MR. GORDON: I'd prefer you didn't, but we can certainly talk about that along the way.

THE COURT: Okay.

MR. GORDON: I apologize, your Honor. The title page on this does not reflect the updated date of January 13th. I have hard copies that do, though. It kept changing, your Honor.

Your Honor, my comments are going to address specifically and directly the swap settlement and certain arguments that have been put forward both by the Retirement Systems and by Ambac, as Ms. English has referred to. Of course, those comments then indirectly address the post-petition financing to the extent that that financing is seeking financing to fund a settlement that we don't believe should be approved.

Your Honor, as Ms. English has also indicated, we are addressing the settlement under Rule 9019, and the question under that rule is whether the settlement is fair and equitable. And, of course, courts have used -- whether it's fair and equitable -- I'm sorry -- and whether it's in

the best interest of creditors, and, of course, courts have used the four-factor test to assess what is fair and equitable in the best interest of creditors. I will be addressing those factors specifically as they apply to two arguments, specifically that the settlement fails in treating the swap counterparties as likely secured creditors. It fails under Bankruptcy Code Section 552 and under Sections 902 and 928 of the Bankruptcy Code.

Under the four-factor test, your Honor, the Retirement Systems submit that the forbearance agreement should not be approved. In summary on this page, we indicate that the first factor is the probability of success, and we submit that the probability of the city being successful in challenging the swap counterparties' asserted liens in the post-petition casino tax revenues is very high.

The complexity, expense, and delay of litigation is the next factor. In that regard, the issues briefed and described below are straightforward and primarily legal issues capable of being resolved by the Court on summary disposition, so the expense and delay are minimal.

Interest of creditors and proper deference to the reasonable views is the next factor. We would submit that the reasonable views espoused by numerous large and important creditors in opposing the forbearance agreement should be given proper deference. The interest of creditors militates

in favor of litigating to avoid an unwarranted windfall to one set of creditors to the detriment of all other creditors.

And, finally, the last factor is the difficulties of collection, and we would submit that that really doesn't have much applicability in this situation or with respect to the arguments that I'm addressing.

Starting with the probability of success, your Honor, the Retirement Systems submit that the city should have sued for declaratory relief and/or lien avoidance with respect to the swaps asserted liens and that they should have done so because there are a host of compelling legal arguments here, the first being, of course, as Ms. English has referred to, that the -- and this is the first of the ones that the Retirement Systems have also articulated, is that the casino revenue liens are entirely invalid under the Michigan Gaming Act. Moreover, however -- and this is what we will -- I will be addressing -- is that even if the casino revenue liens were valid under the Michigan Gaming Revenue Act pre-petition, those liens do not survive the bankruptcy filing under Section 552(a) of the Bankruptcy Code because, number one, they are consensual liens, not statutory liens, and the post-petition casino revenues are not proceeds of those pre-petition consensual liens. That's sort of the Section 552 argument. And then, number two, that the casino revenues are not special excise taxes and, therefore, are not

special revenues under Section 902(2) of the Bankruptcy Code, and, thus, the liens are not special revenue liens under Section 928(a) of the Bankruptcy Code. That's the 902, 928 argument that I will refer to. Your Honor -- and I will deal with those both separately, but, your Honor, ultimately when we go through these arguments, which I think are very strong, there is no reason to treat the swap counterparties as secured creditors with respect to the casino revenues acquired post-petition.

So let's start with Section 552 if we may. Section 552(a) provides that property acquired by the debtor after the bankruptcy filing is not subject to a lien resulting from a security agreement entered into by the debtor prior to the petition date. That is the cutoff provision of Section 552(a). Section 552(a), as indicated in the <u>County of Orange</u> case, quote, "should be viewed broadly given the goal of facilitating a fresh start for the debtor," end quote. As the Court knows, Section 552(a) applies only to liens arising out of, quote, "any security agreements," end quote, which has been interpreted to mean consensual liens, and, therefore, Section 552(a)'s cutoff does not apply to statutory liens and other types of liens. Not surprisingly, therefore, the emergency manager and the swap counterparties claim that the swaps -- I'll call them the swaps or the swap counterparties -- have a statutory lien. They do not.

Section 101(53) of the Bankruptcy Code defines a statutory lien as a -- and I quote -- "lien arising solely by force of a statute on specified circumstances or conditions, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute," end quote. So even if a security interest or a lien is dependent on a statute to be fully effective, that doesn't make it a statutory lien. The lien must arise solely by force of a statute.

The District Court in Orange County cited the legislative history to Section 101(53) of the Bankruptcy Code and stated, quote, "A statutory lien is only one that arises automatically and is not based on an agreement to give a lien," end quote. The Orange County court also cited the authority under Collier on Bankruptcy, which distinguished statutory liens from security interests by stating, quote, "If the lien arises by force of statute, without any prior consent between the parties, it will be deemed a statutory lien. If the creation of the lien is dependent upon an agreement, it is a security interest even though there's a statute which may govern many aspects of the lien," end quote. This language is very important, as you will see.

Here, as of early 2009, your Honor, there were no statutes or ordinances authorizing or creating the casino

revenue liens until the parties agreed upon all of the key terms and presented a term sheet to City Council, which then adopted Ordinance 05-09 for the express purpose of authorizing the collateral agreement, so let's look at the history of the events. On March 31, 2009, the city and the counterparties enter into a nonbinding term sheet for the collateral agreement. On May 26, 2009, the City Council adopts Ordinance 05-09 which adds Article 16 to Chapter 18 of the City Code specifically to implement the term sheet and facilitate the city's entering into the collateral agreement. Section 18-16-4 of the City Code, which was added by Ordinance 05-09, provides in part as follows, and we have the different sections here. Section -- Subsection F recites that the parties entered into a settlement. Subsection H discusses settlement terms. Subsection N states, and I quote, "This Ordinance is adopted for the purpose of implementing the transactions contemplated by the term sheet, and when this Ordinance becomes effective and implemented by one or more resolutions as herein provided and the definitive documents (defined below) are executed and delivered, the complete agreement of the city and the 2006 counterparties shall be expressed thereby," end quote.

Then on June 23, 2009, the City Council passes a resolution authorizing the city to enter into the collateral agreement and other transaction documents, and on June 26 the

transaction documents are executed. Thus, it is clear, your Honor, that Ordinance 05-09 merely facilitated the transaction, and the genesis of the casino revenue liens is in the collateral agreement itself, and we've highlighted the section of the collateral agreement that required the authorizing ordinance to be implemented -- adopted in order to create the lien, but it is provided in the first instance in Section 4.1 of the collateral agreement.

Put another way, the casino revenue liens are not created automatically and solely by force of an existing general statute. To the contrary, Ordinance 05-09 was created in part specifically to authorize and implement the collateral agreement and the liens arising thereunder. In this case, but for the collateral agreement, your Honor, there would be no lien on the casino revenue. Thus, the liens clearly do not constitute statutory liens.

There's also one other interesting argument to take into consideration here, although it's not necessary to this point. You will note that the argument that the casino revenue liens are statutory liens is solely predicated on the effect of Ordinance 05-09. Implicit in that argument then is that 05-09 is a statute. However, we would submit that there is a substantial open question as to whether an ordinance is even the equivalent of a statute for purposes of creating a statutory lien, and we cite the case -- it's not a bankruptcy

case, but we cite the case of Rental Property Owners Association versus City of Grand Rapids, 455 Mich. 246, 247, a 1997 case, where they -- and there's a quote there, "A municipal ordinance is preempted by state law if 1) the state's -- the statute completely occupies the field that the ordinance attempts to regulate, or 2) the ordinance directly conflicts with a state statute," end quote, so you see from the language there that there is a distinction being made between statutes and ordinances that we think ought to be considered as well.

So if the casino revenue liens arise by consensual liens and not by statutory lien, the next question that one has to ask under the Bankruptcy Code is whether Section 552(b)'s exception to the cutoff under 552(a) applies. The exception there is -- provides that if property acquired by a debtor post-petition constitutes the proceeds, products, or offspring of pre-petition collateral, then the pre-petition lien would continue to reach that collateral or those -- that property acquired post-petition. Here we've briefed it extensively. It merits very little discussion.

The post-petition casino revenues acquired by the city clearly are not proceeds of the swap counterparties' pre-petition collateral. The casino tax revenues that are acquired post-petition simply don't arise from the only collateral that the swap counterparties claim that they have,

which is the pre -- which is just the casino tax revenues, so post-petition casino tax revenues are not offspring of pre-petition casino tax revenues. They are products and offspring of the operation of the casinos themselves and the levying of the taxes post-petition.

So the next issue, your Honor, is -- since the liens do not survive under Section 552, the question is whether there is an exception under Section 902 and 928 of the Bankruptcy Code as being liens on special revenues, so let's turn to that, if we may. The emergency manager and the swap counterparties contend that the swap counterparties' asserted liens are liens and special revenues protected under Section 928. They are wrong. Section 902 -- I'm sorry. Hang on a second. Did I go too far? I did. I apologize. Section 902(2) defines special revenues as inter alia, quote, "special excise taxes imposed on particular activities or transactions," end quote. The emergency manager and the swap counterparties have argued that the casino revenues are excise taxes, and, therefore, they're special revenues under Section 902(2)(B) of the Bankruptcy Code. What they gloss over critically is the word "special." Not all excise taxes qualify due to the inclusion of the word "special." And I heard both the emergency manager and counsel for the emergency manager on January 3 say to this Court that the casino revenues are excise taxes; therefore, they're special

revenues, not mentioning the word "special" at all. The placement of the word "special" before "excise tax" in Section 902(2)(B) of the Bankruptcy Code was done to illustrate Congress' intention that Section 928(a) only apply to special revenues that secure the payment of special revenue bonds. As the Court in the Heffernan case stated, and I quote, "According to Congress, comma" -- sorry -- the intent, quote, "is to define special revenues to include the revenues derived from a project or from a specific tax levy, where such revenues are meant to serve as security to the bondholders," end quote, and they are citing the legislative history in that regard. Consistent with this notion that special revenues and the protections of Section 928(a) apply only to revenues that support specific bond finance projects, there was a report submitted in connection with the legislative process that illustrates the situations in which excise taxes should be considered special, and, therefore, special revenues, and this report was drafted by Mr. Richard Levin and Lawrence King. I don't know if they're Mr. Bennett's personal pantheon of great practitioners along with Justice Cardozo, but I think they're fairly authoritative figures. So they write, and I quote, "Hotel-motel taxes, meal taxes, and the license fees are included in special excise taxes. They are often imposed for particular purposes. For example, hotel-motel excise or meal tax might

be imposed in a particular area of a municipality or throughout a city to finance the construction and operation of a convention center," and the last sentence of this paragraph is important. "Bonds secured by the special excise tax are issued to finance the construction." I want to read on for just a moment, and I quote again from the report, "Property, sales, and income taxes would generally not be considered special revenues. However, some exceptions may exist, for example, where a special property tax is levied and collected for the specific purpose of paying principal and interest coming due on bonds issued in connection -- in conjunction with the levy of the -- in conjunction with the levy of the property tax, the revenues may constitute special revenues. In these cases, there is generally a prohibition under state law on using the special tax revenue for any purpose other than the payment of the bonds. However, where the revenue may be used for other purposes, it should not constitute special revenues," end quote.

So were the casino revenues levied for a specific project here? That's the next question. The answer is no. Section 12(3)(a) of the Gaming Revenue Act identifies eight general categories of purposes for which a wagering tax may be used by a city. It does not specify a specific purpose or project to which the proceeds of a wagering tax may be used. So now we look to the City Code to see if there's some

special purpose why these particular casino tax revenues were levied in this instance. Section 18-14-3 of the City Code creates the wagering tax levy by the city. Section 18-14-10 entitled "Use of Proceeds" merely states that the proceeds from the wagering tax can be used for any purpose under the Gaming Revenue Act. No specific purpose is identified.

As such, your Honor, the casino revenues constitute general excise taxes, not special excise taxes, and are not special revenues under Section 902(2)(B) of the Bankruptcy Code. Moreover, the granting of a lien in the casino revenues in favor of the swap counterparties does not change the nature of the casino revenues as general excise taxes. Therefore, Section 928's protection of liens and special revenues does not apply to any asserted lien of the swap counterparties in the casino revenues.

Now, it's interesting. On page 34 of the city's omnibus reply, all they say in response to this is that this argument isn't -- and I quote, "This is not free from doubt," end quote, but that's not the standard under Rule 9019, your Honor. The question is likelihood. Is it likely that this argument is correct, not that it's free from doubt. It's likelihood. And we would submit that the clear likelihood is that the casino revenues are not special revenues.

I heard this morning the swap counterparties' counsel say that they have insurance for their claim. I

would say so what. That doesn't mean that they or their insurers are entitled to be treated as secured creditors.

Your Honor, the analysis that we just went through under 902 is very much consistent with the well-recognized purposes as to what 928 was adopted in the Bankruptcy Code for. A leading treatise indicates that Section 928(a) should only apply to liens on special revenues that secure revenue bonds that finance the project from which the revenue is derived, and we cite Collier on Bankruptcy for that.

In the County of Orange case, it was stated by the Court that the goal was to remove the risk that revenue bondholders would be stripped of their liens on revenue acquired by the debtor after the commencement of a municipality's Chapter 9 case pursuant to Section 552(a) of the Bankruptcy Code. Collier's states, and I quote, "The effect is to prevent a -- prevent special revenues that secure an issue of revenue bonds from being diverted to be available for the municipality's general expenses or obligations," end quote. That's essentially what's threatened here. Here, your Honor, the swap agreements bear no relation to the development of the casinos that generate the casino revenue and, therefore, bear no relation to the policy and intended class of protected claim holders under Section 928(a) of the Bankruptcy Code. The rationale for Section 928(a) to encourage bond financing investment in

municipal programs or projects by protecting the holders of those bonds is simply not implicated with respect to the swap counterparties and their asserted lien claims. So that deals with the probability issues, your Honor.

I would submit it's a bit astonishing if you look at the papers filed by the emergency manager and the swap counterparties how little space they devote to these issues. They, instead, gloss over these issues, I would submit.

The complexity -- then the other factors that need to be considered, there's the complexity, expense, and delay of litigation. Your Honor, here, as I've indicated, these issues are straightforward and primarily legal in nature. You may recall actually the Court at the beginning of the swap matters back in August asked whether there was any need for an evidentiary hearing because the issues seemed to be legal in nature, and it was only when the emergency manager's team suggested that they need to put witnesses on that suddenly it turned into an evidentiary hearing. This is not highly fact-intensive. These issues are susceptible to resolution, I would submit, on summary disposition. For these reasons, the litigation of these issues should not constitute a significant expense, particularly relative to the overall expense of the case and the dollars at stake in this matter. Similarly, in that context, these issues could have been and still could be litigated in a very quick

fashion, so the delay in administration of this case is not a factor. In fact, at the pace that this case has been going, I would submit that these issues could have been litigated three or four or five times over by now.

So what is the response of the emergency manager to these issues? I would submit not much. It is recited in a mechanical and pro forma way that the expense and delay of litigating should be avoided, and a settlement provides, quote, unquote, financial stability. I don't know how layering on $165 million of new debt on the city stabilizes the city's finances. That boggles my mind. I don't understand that at all.

And then let's look at the proverbial expense and delay that the emergency manager articulates in an anemic sort of way. As I've mentioned, the expense relative to saving $165 million cannot be a concern in this situation is not persuasive, and the delay is not an issue either. Ms. English has indicated that with respect to the arguments under Act 34 and so forth that the litigation may take up to six months, and that may well be. I would submit for these issues maybe six weeks. It does not take that long to litigate these issues. I heard on January 3 counsel for the city make reference to that oft cited standard under the W.T. Grant case that a settlement under Rule 9019 only needs to meet the lowest point in the range of reasonableness. I

really question whether that court ever thought that what it stated in that regard would become the standard under Rule 9019 for all settlements that debtors bring before courts, but I would submit that that shouldn't be the target, the lowest point in the range of reasonableness, and it shouldn't be a self-fulfilling prophecy. And in any event, I don't think this settlement even comes close to the lowest point in the range of reasonableness for all the reasons I've stated and the reasons that Ms. English has stated this morning. I would submit that the city and its creditors deserve far, far better.

Your Honor, I don't know why the emergency manager, quite frankly, is pushing this deal. Often you can at least see some reasons. I don't see them in this case at all. On December 18th, the Court suggested to the emergency manager that his team go back to the drawing board, and they emerged several days later with a revised settlement that is remarkable in its obstinacy because it doesn't take to heart the Court's direction and puts back before this Court a settlement that fundamentally continues to ignore the arguments that are being put forward by parties such as Ms. English and myself against the swaps positions and is not substantially or meaningfully better than the original deal and, indeed, may be worse by the time the case -- by the time the transaction would close. That's all I have, your Honor.

Thank you.

THE COURT: Thank you, sir.

MR. PEREZ: Should I go, your Honor, or are you going to take a break? Go forward?

THE COURT: Sorry?

MR. PEREZ: Should I go forward?

THE COURT: Yes.

MR. PEREZ: Okay. Your Honor, Alfredo Perez on behalf of FGIC.

THE COURT: Let me just caution you about this little time limitation I do have. I need to break at about quarter till or ten till twelve for a judges' meeting that I have at noon.

MR. PEREZ: No problem, your Honor. I will probably be the briefest of all of the speakers, so I can't imagine I'd be more than about 20 minutes. Your Honor, as a housekeeping matter, I do have copies of the -- certified copies of the order and the plans, whenever I need to substitute that in the record. Those were Exhibits, I believe, 305 and 306 --

THE COURT: Okay. Thank you, sir.

MR. PEREZ: -- that were entered in, and I just didn't have them at the time.

CLOSING ARGUMENT

MR. PEREZ: Your Honor, I'm only going to address a

couple of things in connection with particularly the forbearance agreement and the insurance rights with respect to the forbearance agreement. Ms. Ball indicated that what we had was here the allowance of a secured claim, and I think it's a lot more than the allowance of a secured claim. First of all, your Honor, the parties -- the swap counterparties and the city seek to terminate pursuant to the early termination provisions. They don't seek to terminate pursuant to the early termination provisions of Section 6 but, rather, through the optional termination provisions. And, your Honor, pursuant to those provisions, the swap counterparties cannot terminate and cannot receive a payment. The optional termination provision explicitly provides -- and that's found on part 5(xx) of City Exhibit 133 -- that for the avoidance of doubt, in no event will Party B owe any money to Party A in connection with the election by Party A to exercise the swap termination, so, in fact, just because it's the city as opposed to the service corporations, which are, in fact, the parties to the swaps that are making the payment, that doesn't change the result. There is no way that the swap counterparties can terminate under that provision and receive payment.

And, your Honor, the testimony from Mr. Buckfire is directly on point. He confirmed that if you use the optional termination provisions, the right to walk away without

receiving payment, and if you look on the transcript of December 17th, page 173, lines 13 to 24, again page 174, lines 12 to 13, and page 175, lines 15 through 19, they cannot terminate pursuant to that optional termination provision and receive payment. So obviously, your Honor, that begs the question why is it that they're terminating under Section 5(xx) as opposed to the optional termination provision under Section 6? And the reason is is that under Section 6 it's clear that they cannot terminate without our consent, so they're trying to shoehorn themselves in a provision which says they can't receive any money, yet they're receiving $165 million, and the provision that they can use, which would -- in which they are entitled to receive money, they can't do that without our consent, your Honor, so we believe that the forbearance agreement, in essence, modifies the swaps. They're not entitled to modify the swaps transaction without our consent and that, in essence, what they're doing is they're modifying it against our economic interest, which they're not allowed to do.

Furthermore, your Honor, the proposed transaction and specifically the order in connection with the proposed transactions goes way beyond approving a settlement under 19, goes way beyond approving the assumption of a contract under 365. It basically grants a third-party injunction against our clients. Section G -- I'm sorry. Paragraph G of the

proposed order basically has the Court make a finding that the parties' entry into and performance under the forbearance agreement does not violate any law, including the Bankruptcy Code, does not give rise to any claim against the parties thereto except as expressly provided in the orders, and paragraph 4, paragraph 5, paragraph 7 all make similar types of findings that, in essence, immunize the swap counterparties from any potential claims that we may have. I mean as the Court is aware, the -- under the Dow Corning case in the Sixth Circuit, generally speaking, third-party injunctions against and third-party releases are not permissible except under unusual circumstances in the plan context. We're not in the plan context. There's no evidence as to the unusual circumstances, so that would be impermissible at this point.

Additionally, your Honor, they're using Rule 9019 to extinguish third-party rights. There is -- there are many cases, and probably the best one is the one cited in the materials. It's called SportsStuff, and let me just read to you the provision in SportsStuff because they're going much farther than they really should be going in the context of a 9019. You heard previously them saying that you have to make a determination as to our consent rights in order to rule on this motion. I think it was repeated by Mr. -- counsel for the swap counterparties this morning. I didn't quite hear

it, but I think he did repeat that, but in SportsStuff it says a settlement between only two parties to a multi-party lawsuit is not a settlement, and a procedure to approve a compromise under 9019 cannot be used to impose an injunction on a nonsettling party. And it basically -- and it goes on, and that's precisely what I believe they are trying to do here.

THE COURT: I'm a little confused. Do you agree that the issue of consent rights should be determined now or not?

MR. PEREZ: I don't think the Court can determine that. I don't think that's before the Court, your Honor. I don't think that in the context of a 9019 or in the context of a 365 the Court can determine the rights as between a third-party to that settlement. It's got to be -- it's got to be an open issue, your Honor.

THE COURT: Well, but the parties can consent to that. That's why I asked. Do you consent to it or not?

MR. PEREZ: We do not consent to that, your Honor, absolutely not. And, your Honor, there's lots of cases -- and several of them are cited, including the D.J. Christie case, which you can't -- you can't, in essence, decide things in order to prejudice people's rights, and the same thing is true, your Honor, in the context of 36 --

THE COURT: Well, but how can I determine whether

it's appropriate for the city to enter into the forbearance agreement without determining your client's consent rights?

MR. PEREZ: Well, your Honor, I think the Orion case speaks to that, and let me just read the provision of the Orion case, which I think is very important. And this is in the context of 365, and it was, in essence, my next argument. It says, "Finally, it's important to keep in mind that the bankruptcy court's business judgment" -- because, in essence, that's what you're going to be doing; you're going to be determining whether their business judgment in assuming this contract was appropriate -- "in deciding a motion to assume is just that -- a judgment of the sort a businessman would make. In no way is this decision a formal ruling on the underlying disputed issues, and thus will receive no collateral estoppel effect. In a given case, the bankruptcy court might decide it would be beneficial for the trustee or the debtor-in-possession to assume a certain contract. The court thinks it unlikely that a court would hold the debtor breached the contract, and thus assuming the contract would be good 'business judgment.' This 'business judgment' could turn out to be wrong, however, if a letter -- if a later fact finder in an adversary proceeding decides that the underlying contract was in fact breached. In such a case, the judge's wrong decision is simply an error of business judgment, not a legal error." So, your Honor, you might be making a

preliminary decision on that. You might be informing yourself as to the facts, but you're not making a decision on the merits, and that issue is going to be left for another day.

And, your Honor, there are -- the Orion case, which I read from, is probably the leading case on it, and there are several other cases, Big Rivers, GI Industries, which also address this issue and including the issue of the enforceability of the contract. We've submitted proposed language in the order which would, in essence, leave everybody's rights -- and it would -- and it would, in essence, undo many of the findings that they're asking you to make in connection with, in essence, taking away our third-party rights.

Finally, your Honor, is the question of the harm. In essence, this is a balancing of the harms, and there is harm to the insurers as a result of this. We have very long dated obligations. Some of them go out for more than 20 years. The swaps were intended to insure against that risk, and sometimes there was -- in fact, there was at one time where there was a payment made by the insurance to the city because the interest rates were in their favor, so to that extent, taking away the hedge, in essence, does that. Ms. Ball argued that in 2009 the city had, in essence, done away and that the hedge had been undone, but, your Honor, that's

only in the case under this provision that they're trying to shoehorn themselves where the city would be receiving a payment, not where the city would be paid. It was never contemplated, and if you read the plain language of that section of the amended schedule, Section 5(xx), it was never contemplated that the swap insurance would be receiving a payment. It was always contemplated that the city would be receiving a payment, and if that were the case, they could have easily gone out and hedged again cheaper than they've done -- than they've done -- than they would have done because of that.

Additionally, your Honor, the contract administration agreement, Section 6.9.2, basically gives the swap insurers broad consent rights, and what the city and the swap counterparties are doing is is they're just trampling through our consent rights as a result of amending -- in essence, amending the swaps, taking out the provisions that are helpful, and trying to shoehorn themselves in a provision that simply doesn't work.

Finally, your Honor, unrelated to the swaps but more related to the DIP, the Court, in essence, instructed us to -- that we couldn't address the issue of need and that we couldn't address the issue of use of funds. If those two things are not in the record in connection with the financing motion, I question how the Court can make a good faith

finding if there's no evidence on any of the -- on any of those two issues. Thank you, your Honor.

THE COURT: Thank you, sir.

MR. MARRIOTT: Good morning, your Honor. What time did you say you needed to break?

THE COURT: I need to break at a quarter till or ten till, approximately.

MR. MARRIOTT: All right. I think that works for me.

THE COURT: Excellent.

CLOSING ARGUMENT

MR. MARRIOTT: Your Honor, Vince Marriott, Ballard Spahr, on behalf of EEPK and affiliates. I'm going to ask you to switch gears in your head now from forbearance agreement to DIP because what I'm going to be talking about is the DIP, and what I'm going to be addressing are two process issues and whether or not the city cleared two gateway hurdles to obtaining the relief they seek with respect to the post-petition financing.

Your Honor, one of these gateway hurdles arises under the Bankruptcy Code and one under state law, and each is designed to protect the integrity of the process so that creditors and other stakeholders are not unduly or unnecessarily prejudiced by the city's efforts to obtain post-petition secured financing from Barclays on the terms it

proposes here.

The Bankruptcy Code gateway issue is contained in 364(c) with conditions, approval of secured post-petition financing on a demonstration by the debtor that unsecured financing is not available. The state gateway issue is contained in PA 436, which both requires the emergency manager to submit a proposed financing to City Council for approval or disapproval and entitles the City Council to attempt to find an alternative transaction that is at least economically equivalent to what the emergency manager proposes.

THE COURT: Sir, I'm advised that in the overflow courtroom they can't hear you very well. Can I ask you to turn the microphone more towards you?

MR. MARRIOTT: Yes. Hopefully that's better.

THE COURT: Yes. That sounds better.

MR. MARRIOTT: Seems better in here.

THE COURT: Yes. Go ahead.

MR. MARRIOTT: All right. I'm going to begin with the Bankruptcy Code and Section 364, and the statute provides specifically that it is a condition to seeking approval of secured post-petition financing or -- and/or financing which has a superpriority administrative expense that the debtor have been unable to obtain unsecured credit. It is the burden of the debtor to demonstrate that it is unable to

obtain such credit, and that burden cannot be met unless the debtor demonstrates it actually attempted to do so, and there are a great number of cases to this effect. The L.A. Dodgers case, a recent case out of the District of Delaware, 457 Bankruptcy Reporter 308, "The Court may not approve any credit transaction under subsection (c) of Section 364 unless the debtor demonstrates that it has attempted, but failed, to obtain unsecured credit under section 364(a) or (b)." Another recent case out of the Southern District of New York, MSR Hotels & Resorts, 2013 Westlaw 5716897, "The standard here does not permit a debtor to purposely choose not to seek financing on better terms on the basis that they themselves subjectively believe that financing they've obtained is the best terms possible." I'll skip a few of these, drop down to In re. Ames Department Store, 115 Bankruptcy Reporter 34, "A court, however, may not approve any credit transaction under subsection (c) unless the debtor demonstrates that it has reasonably attempted, but failed, to obtain unsecured credit under sections 364(a) or (b)." Sorry.

Your Honor, the testimony of Mr. Doak was clear. The city did not ask a single lender whether it would provide unsecured credit. Mr. Doak testified,

"Question: As part of the solicitation process, you did not send out a solicitation document that asked parties to return bids for unsecured

financing; right?

Answer: No, we did not.

And did you personally ask any prospective lender -- and you did not personally ask any prospective lender if it would make the DIP loan on an unsecured basis; right?

Answer: I did not ask that particular question."

On further cross, he was asked,

"Question: My understanding is that you led the efforts of the city to find post-petition financing; correct?

Answer: Yes.

Okay. Did you direct anybody else to contact a prospective lender or lenders to ask if they would provide to the city unsecured credit?

No, I did not.

Did anybody do that anyway and report to you the answer?

Not to my knowledge, no."

Your Honor, indeed, when the city approached prospective lenders, it did so with an indicative term sheet that proposed to provide lenders all the collateral that ended up being part of the Barclays deal as well as a superpriority administrative expense that is also part of the

Barclays deal.

Your Honor, a brief excerpt from City Exhibit 56, the collateral swap termination loan. They describe the collateral as income tax revenues, asset proceeds collateral, quality of life loan, swap termination loan, asset proceeds, income tax revenues, quality of life loan, casino taxes, and asset proceeds collateral and a junior lien on the income tax, and all the loans were going to have a 364(c) and 503 superpriority administrative expense status. This is what went out to prospective lenders. This, of course, put the rabbit in the hat and essentially reduced to zero the chances that any lender would make a proposal without collateral or without a superpriority administrative expense. Mr. Doak himself acknowledged this. He was asked,

"So the initial proposal that you sent out contemplated that the DIP financing would be secured; correct?

Yes.

And the collateral that the city included in its initial proposal was income tax revenue, asset proceeds, and casino revenues; correct?

Yes.

And you would agree with me that it would be unlikely that a potential lender would remove protections that went out with the city's initial

proposal; right?

Answer: I would agree."

The city has attempted to overcome this failure to even ask for unsecured credit by offering as opinion testimony the view of Mr. Buckfire and Mr. Doak that such credit would not have been available in any event.

I'll point out, Judge, that as an initial matter -- this is not under 364(c) but 364(d), which has a comparable requirement that the debtor demonstrate that better credit is not available, that -- and this is the Reading Tube Industry cases. The court could not find that the debtor met its evidentiary burden based solely on opinion testimony of the chairman of the debtor's board, an individual with extensive financing experience and business acumen, that less onerous financing was not available where the debtor did not engage in an effort to approach other potential lenders. Essentially the Court -- you're being asked to do something that the Reading Tube court declined to do, and that is accept testimony from an individual who, notwithstanding extensive financing experience and business acumen, really shouldn't be making opinion testimony on this issue when all you really actually have to do is go out and ask.

More specifically, Judge, the availability of unsecured credit to a Chapter 9 municipal debtor is simply not presently amenable to expert testimony that should be

accorded any weight. First, both Mr. Buckfire and Mr. Doak acknowledged that neither has had any past experience in sourcing municipal debt. This was his testimony to that effect. Mr. Doak,

"Prior to this case, you had no personal experience sourcing municipal financing; isn't that correct?

That's correct."

Mr. Buckfire,

"My expertise is in the origin of DIP financing for corporations. This is the first municipal DIP financing we have arranged."

Indeed, Mr. Buckfire testified that nobody has done this before. This has never been done before. Nobody has ever done a post-petition financing for a municipality, so it's new and different. Because no one has any experience in sourcing municipal debt for a Chapter 9 debtor, there are no antecedents to provide supporting facts or data for an opinion. Under those circumstances, the prudent course would be to ask. After a certain amount of no's, Mr. Doak or Mr. Buckfire could perhaps have opined that they had sufficient data points to conclude that further inquiry would be futile, yet, as noted, neither Mr. Doak nor anyone else on his team approached a single lender about providing unsecured credit. Indeed, Mr. Doak went out to market with a proposed

collateral package, which surely frustrated any effort to obtain unsecured creditors -- credit. In other words, as a practical matter, no data was available from which to form a basis for an opinion on the availability of unsecured municipal credit to the city.

As a result of this failure to seek any input from the municipal markets at all and, thus, lacking any facts whatsoever upon which to base any opinion, Mr. Buckfire and Mr. Doak are simply expressing their own personal views on the subject of available unsecured credit, which is simply not helpful to the Court. As Judge Spector of this Court has observed citing to the Supreme Court's Daubert case, "It is not sufficient for the expert's testimony to be based merely upon subjective belief or unsupported speculation," and that's in the Dow Corning case, 237 Bankruptcy Reporter 364 at 367.

Now, if we could put Exhibit 61 up. Ms. Ball in her argument made reference to City Exhibit 61 in support of meeting the city's burden with respect to the lack of availability of unsecured credit, and Exhibit 61 was a document produced by JPMorgan. As evidence of the lack of availability of unsecured credit, however, this exhibit suffers from two infirmities. The first is that, like the indicative term sheet that was sent to prospective lenders, the city communication to JPMorgan to which Exhibit 61 was a

response indicated from the outset that the city would be providing collateral. This is indicated in the document itself at the top there. The city and its advisors have identified four distinct revenue streams to be used as security to secure any potential lending facility, so, again, out of the box and when approaching JPMorgan the city was putting the rabbit in the hat.

Could we go back to -- Mr. Buckfire, in his testimony, confirmed this point. When he was asked by Mr. Hackney when the city sent whatever it sent to JPMorgan soliciting the response that Exhibit 61 constituted, he indicated that, "So isn't it fair to say" --

"Question: So isn't it fair to say, Mr. Buckfire, that the proposal that you sent out there also suggested collateral to the market?"

Some colloquy, then my question was,

"Isn't it true that when you sent that letter out --

Yeah.

-- it proposed collateral to the market?

Answer: Yes, it did."

Now, the second issue, your Honor, is as and to the extent that the city wants to use Exhibit 61 generated by JPMorgan as evidence of what was available in the market, they are actually asking the judge to rely on the opinion of

JPMorgan, but JPMorgan wasn't here to testify. JPMorgan wasn't here to be cross-examined. Therefore, JPMorgan is not in a position to provide opinion testimony to this Court on the availability of unsecured credit.

In short, your Honor, having failed to take the simple step of genuinely testing the market for the availability of unsecured credit, the city has failed to meet its burden under Section 364(c) to demonstrate the unavailability of such credit.

Second gateway issue, your Honor, is PA 436. Oops. This should be back to the -- Judge, Section 19 of PA 436, which is what is up on the screen, provides that the emergency manager must submit a proposal to borrow money to the Detroit City Council. Now, that requirement is in Section 12(u). They list various parts of Section 12. The requirement that a borrowing be submitted is Section 12(u), which then has ten days to approve or disapprove. In addition, the City Council is given the opportunity if it does not approve the proposal -- this is in 19(2) -- to seek and propose an alternative with the same or presumably better financial result.

Mr. Orr did, in fact, submit the Barclays proposal to City Council. This was City Exhibit 98. But such submission was incomplete. It did not include the fee letter, which was City Exhibit 93. The fee letter -- it is

the fee letter which set forth what has been called market flex, and your Honor may recall that market flex was the ability that Barclays has if the loan is approved to go out and to syndicate the loan to other lenders, and if it is necessary to achieve a successful syndication, it is entitled to raise the minimum interest rate under the facility from 3.5 percent up to 6.5 percent so that the market flex provision and the specifics of it demonstrate a significant variability in what might end up being the minimum interest rate on the loan from 3.5 percent to 6.5 percent.

Other than the fact that there was market flex, the substance of it was never provided to counsel. This was clear from the testimony of both Mr. Doak and Mr. Orr. Mr. Doak testified that,

> "In discussions with City Council, the substance of the market flex provision was not provided to the City Council; right?
>
> Answer: No, it was not.
>
> Question: The city notes the existence of market flex but does not actually disclose the specific terms of the market flex; correct?
>
> Answer: Yes."

Mr. Orr testified first correctly that he provided to City Council his submission, Exhibit 98.

THE COURT: I'm sorry to interrupt you, sir, but,

again, I've been asked --

MR. MARRIOTT: Oh, I'm sorry.

THE COURT: -- to ask you to adjust the microphone again and try to stay closer to it.

MR. MARRIOTT: I apologize. I get wrapped up in my own argument. Referring to Exhibit 98, which, as I mentioned, was the -- Mr. Orr's submission under Act 436 to the City Council,

"But Exhibit 98, the submission to City Council, did not include a copy of the fee letter that we just reviewed, which was Exhibit 93; correct?

I believe that's correct.

Just the term sheets that were attached to the commitment letter; correct?

Yes."

And the term sheets, your Honor, did not contain the scope of the market flex. It merely identified that there was market flex. It was the fee letter that provided the substance of the market flex.

"Now, other than this communication to City Council regarding the proposed Barclays financing, which does not include the fee letter, which has the substance of the market flex provision, did you personally otherwise communicate to City Council the substance of the market flex provision that's

contained in the see letter -- in the fee letter?

Answer: No.

To your knowledge, did anybody else?

Not that I know of."

And Mr. Doak confirmed that he didn't.

Now, Judge, it goes without saying, but each of Mr. Doak, Mr. Buckfire, and Mr. Orr confirmed it anyway. The cost of a credit facility is a key component in the evaluating the attractiveness of the facility. Mr. Doak,

"And you would agree with me that pricing was an important fact when you were evaluating the various proposals; right?

Answer: Yes, it was."

Mr. Buckfire,

"And the cost of this facility was an important factor in Miller Buckfire's evaluation of the proposals; isn't that right?

Answer: Yes."

Mr. Orr, who made the ultimate decision to accept the financing,

"When you were asked earlier on direct what factors you considered in making the selection, the first factor you indicated was the cost of the various alternatives available to you; correct?

Yes.

And, in fact, the cost of financing is an important factor in deciding whether or not to undertake a financing transaction; correct?

Answer: Yes."

In keeping with the importance of knowing the true cost of a financing facility and evaluating it, the testimony makes clear that neither Mr. Buckfire nor Mr. Orr would recommend -- I'm sorry -- neither Mr. Buckfire nor Mr. Doak would recommend and Mr. Orr would not approve a financing as to which they did not know the true cost.

Testimony of Mr. Doak,

"In fact, you would not have been in a position to recommend the transaction to Mr. Orr if you were not aware of the specifics of the market flex provision; right?

Answer: I think that's correct, yes."

Mr. Buckfire,

"Question: I believe you testified earlier that you ultimately recommended the Barclays proposal to the emergency manager on the basis that it was -- and I think your phrase was 'the cheapest one.' Do you recall that testimony?

I do.

In order to evaluate among alternative what's the cheapest one, you have to know what the cost of

each of the alternatives is; correct?

Correct.

I mean otherwise there's no basis to make a comparison; correct?

Answer: Correct."

And Mr. Orr, "And, indeed" --

"Question: And, indeed, it would be imprudent to accept a financing proposal if you did not know what the cost of the financing would be; correct?

Answer: It might be.

Well, it might be or it would be?

Generally, yes."

Now, the city -- let me first say, having said that they wouldn't recommend a facility if they didn't know the true cost and Mr. Orr saying he wouldn't approve a facility if he didn't know the true cost, this is exactly what they asked of City Council in supposedly complying with PA 436. They recommended and sought approval of a facility as to which they failed to disclose the true potential cost and asked the city to do something that all three of them indicated they would be unwilling to do.

Now, the city attempts to gloss over this failure by stating that in meetings with council members -- Ms. Ball referred to this in her argument -- Mr. Doak provided to such members a range of possible rates. This was in Exhibit 90.

This is page 6 of Exhibit 90, including the cover page. This is the range that the city testified to and that Ms. Ball was arguing from, and it's in the middle there. And the argument is that this range covered the upside of the market flex, yet, your Honor, a range is not what was provided to Mr. Orr, but, rather, the actual terms of the market flex. If we could have Exhibit 89, and if we could go to page 6, which is the last page. Well, maybe one more page. This is what was provided to Mr. Orr. This doesn't just have some hypothetical range. This shows the actual terms of the market flex so that he had available to him the specific information. And if we could go back to the PowerPoint. And this is what Mr. Doak says. Mr. Doak testified that merely having a range of possible interest rates without knowing the actual possible interest rate would be insufficient for him to make a recommendation to the emergency manager.

"Okay. Now, in providing information to Mr. Orr, you didn't provide a range of potential rates from five to nine percent. You provided the actual potential interest rates, market flex and all, under each of the commitments that the city had in time -- had in hand at the time; correct?

Yes.

Would you have considered yourself adequately advising him on the potential costs of these

facilities? Instead of giving him the actual interest rates, you just gave him a range?

Answer: No."

Moreover, your Honor, when the time came ten days later to prevent a -- to present a briefing to City Council on the Barclays transaction itself, the only substantive rate information given was the low end of the possible rate on the Barclays loan, 3.5 percent. And if we could go to Exhibit 91, which are the materials presented to City Council at that time for that briefing -- look at Exhibit 91. Under "Pricing" on page 6 of that LIBOR plus 250 basis points, 100 basis points, floor; i.e., 3.5 percent as the minimum rate, what do they say about market flex? Subject to market flex. Don't say what it is. Don't see any interest rate ranges there. The only number available to City Council is 3.5 percent.

Now, Judge, one response to this might be, well, City Council said no anyway. They just would have said no more vigorously if they'd known the complete interest rate provisions for the Barclays proposal, so no harm. Well, there are two responses to that, your Honor. The first is appointment of an emergency manager is an extraordinary step involving the shifting of control over a city from its elected representatives to a state appointee with only a limited reserved role for those elected representatives. One

such limited reserved role is the ability to approve or disapprove borrowings by the city. The integrity of that limited role is undermined if the emergency manager is permitted to withhold material information when seeking such approval or disapproval.

Moreover, just as an example, what if the City Council had instead said yes thinking the interest rate was 3.5 percent only to find out later that due to market flex it had jumped to 6.5 percent? A transparent process would prevent that sort of outcome from happening. A process where material terms are kept from City Council invites such an outcome, if not here, the next time with something else, and highlights the need for the emergency manager to make full disclosure.

Now, second, Section 19 does not just give City Council the ability to approve or disapprove. There is the corollary right to seek an alternative proposal that would yield the same or better financial result. The City Council has -- if the City Council has withheld from it material information about the true cost of the loan proposal put forth by the emergency manager, its ability to exercise this right is frustrated, what's its target? How will it know it's found a better deal if it doesn't know the material terms of the deal before it? It may well have been impossible for City Council to find an equivalent or better

financing proposal at 3.5 percent, and that's all it knew in terms of what its target might be. If it had known it might go up to 6.5 percent, it might have had a better shot at finding a proposal that it could present as at least as good.

Accordingly, your Honor, in sum, the city has failed to satisfy its second gateway hurdle either. It has not really complied with PA 436 because it really did not provide to City Council all the material terms of the proposal it was asking it to approve and the proposal that the City Council had the right to try to seek an alternative for. Both for this reason and because of the city's failure to meet is burden under 364(c) to demonstrate the unavailability of unsecured credit, it's our position, your Honor, that the city's motion to approve post-petition financing should be denied.

THE COURT: Thank you, sir. Stand by, please. All right. We'll break for lunch now. I'm showing 82 minutes left for the objecting parties' arguments. We'll reconvene at 1:30, please.

THE CLERK: All rise. Court is in recess.

(Recess at 11:44 a.m., until 1:30 p.m.)

THE CLERK: All rise. Court is in session. Please be seated. Recalling Case Number 13-53846, City of Detroit, Michigan.

THE COURT: It appears that everyone is here. Let's

proceed.

MS. GREEN: Good afternoon, your Honor. Jennifer Green on behalf of the Retirement Systems for the City of Detroit. Before I begin, can I just confirm how much time we have left?

THE COURT: I'm showing 82 minutes.

MS. GREEN: And one additional housekeeping matter before I begin. I just wanted to inform the Court that the deposition transcripts for the witnesses who were not called live have been provided to the court clerk as of this morning.

THE COURT: Okay. Let me just be sure I have the ones you're thinking about. I have Mr. Turbeville.

MS. GREEN: Yes.

THE COURT: Mr. Corley.

MS. GREEN: Yes. There were only two.

THE COURT: Oh, those are the two. Okay.

MS. GREEN: You have them both.

THE COURT: Actually, one more housekeeping matter. It would help me if I could have hard copies of the other PowerPoint slideshows that were used during closing arguments --

MS. GREEN: Yes, your Honor.

THE COURT: -- if those are available.

MS. GREEN: How many copies would you like?

THE COURT: Just the one is fine.

MS. GREEN: Just one. Okay.

CLOSING ARGUMENT

MS. GREEN: This morning Ms. English addressed the validity of the casino revenue pledge as it relates to the assumption motion, and I will be addressing the validity of that pledge as it relates to the financing motion. Specifically, I'm addressing the proposed order submitted by the city in connection with its financing motion and whether the city has carried its burden of showing the validity of the pledge in support of the proposed Barclays loan.

So let's start by taking a look at the proposed order itself. The proposed order the city seeks to have entered by this Court states that the city is authorized to grant perfected security interests in and liens on the quality of life bond collateral, which is the casino revenue. And the picture here is of the proposed order, page 3. The proposed order also requests that this Court find the pledge of the casino revenue to be valid, binding, enforceable and nonavoidable. Thus, the city has the burden of establishing that its pledge of the casino revenue as collateral is valid and enforceable, but in order to do so, the city must first establish, number one, that the casino revenue can be pledged as collateral for a financial obligation of the city, and, number two, if it can be pledged, that the purpose for which

the city intends to use those quality of life funds in this case complies with Section 12 of the Gaming Act.

And with respect to this first issue, the glaring problem with the city's proposed order is that the city has not once during this proceeding taken the position that the pledge of the casino revenue is actually permissible, yet it seeks this Court to order that it is, indeed, permissible. For example, you may recall that during the city's closing arguments on January 3rd, the city emphasized how low the burden is for the city to seek approval of the swap settlement under the business judgment standard, and the city urged this Court that the lowest point of reasonableness is all that is necessary under that standard. And in support of its theory of the case, the city has argued that in order to prevail, all it has to establish is that there's a chance that the casino revenue lien is invalid; that there's arguments on both sides; and that while there may be doubt as to whether the casino revenue can even be pledged in the first place, it is this doubt and this uncertainty that is causing it to settle in the first place. And this uncertainty might be acceptable, although the objecting parties don't agree, but it might be acceptable under a Rule 9019 analysis or under a business judgment analysis, but this uncertainty, which is now all that is in the evidentiary record, does not satisfy the burden the city must establish

for this Court to enter an order with findings that the city is actually authorized to pledge the casino revenue. The 50-50 chance that you've heard all about is not enough, for instance, to demonstrate to this Court that the casino revenue can actually be pledged in compliance with Michigan law.

And the second issue is, even assuming this Court were to find that generally the casino revenue can be used as collateral for a financial obligation of the city, a separate issue is that the quality of life proceeds must actually be used for one of the eight enumerated purposes under the Gaming Act, and, once again, the city has boxed itself sort of into this impossible position. It's argued that the scope of your review was so narrow that it does not have to concern itself with how the funds are used, but the problem with that is the city is now stuck with a record that is barren of any facts or testimony sufficient to enable this Court to satisfy itself that the funds will, indeed, be used in compliance with Section 12 of the Gaming Act. And, in fact, not only is the record barren of any testimony averring that the funds will be used for any particular purpose, the only affirmative testimony on point actually came from Ken Buckfire, who admitted the funds would be used only as working capital, nothing more, and, you know, not for any particular quality of life program. So as we will see in the next few slides,

there's nothing in the record to establish either of these two elements to the case.

This morning Ms. English went over the Gaming Act and the eight enumerated purposes, so I will not reread them into the record. Subsection 5 is the section that the city is seeking to hang its hat on, and it states that other programs that are designed to contribute to the improvement of the quality of life in the city. Notably, as Ms. English stated this morning, hiring, training, deployment of street patrol officers, public safety programs, things of that nature, are specifically provided for in the Gaming Act, and yet rather than commit to any of those purposes, the city has said that it wants to fall within the catch-all of the improvement of the quality of life for the citizens in the City of Detroit. But as admitted by the city and its witnesses, there's nothing in the Gaming Act and in those eight provisions in particular that permits the funds to be used as security for a loan, and Kevyn Orr admitted as much during his direct exam. And we have quoted here his testimony where he states, "Under the state's Gaming Act, there was an argument that the pledge of the casino revenue in 2009 to -- as collateral for the COPs was inappropriate. Section 12 of the Gaming Act. It was my understanding there were certain limited uses of the gaming revenue -- approved uses by state law and that there was an argument that to

pledge it for collateral was inappropriate." And when he was asked by his counsel why it was inappropriate, Mr. Orr explained, "there were certain specified uses under the Gaming Act generally for programs, street patrol officers, educational programs, or improve the quality of life in the city," but he admitted the act did not specify the use of gaming revenue as collateral for an unrelated debt.

And you may also recall that Mr. Orr mentioned that weaknesses with respect to the pledge of the casino revenue claim was that there were legal opinions in support of the pledge and that City Council had voted and even passed an ordinance supporting the pledge. Notably, with respect to the post-petition financing, there is no such legal opinion opining that the casino revenue pledge is appropriate, and City Council resoundingly voted down the proposed Barclays loan.

To add to this uncertainty, the city has never been willing to commit what it will use the funds for in writing in any of its papers. What we have on the screen for you is the actual motion that was filed in support, and it is Document Number 1520 on the docket, and the city would only go so far as to state that the quality of life note, quote, "may ultimately be used to fund reinvestment initiatives such as police, fire, and blight." The word "may" is the same if you continue into the proposed order that the city has filed

on the docket. It just states that after the loan is closed, then the city will provide some sort of report regarding what the funds are used for, not before closing and not before this Court is being asked to enter an order that actually signs off on the validity of the pledge. In other words, the city just says to the Court, "Trust us. We'll use it for a good purpose, and we'll report back 30 days after closing." And, again, the problem with this is that the city is asking for this Court to approve the use of the casino revenue without having first confirmed to the Court that it will use it for one of the purposes specified in the Gaming Act.

Furthermore, the city's own witnesses and documents, which make up the evidentiary record in this hearing, demonstrate that no such quality of life usage is guaranteed to occur in this case. Ken Buckfire, the city's investment banker, admitted that the quality of life loan proceeds are really intended to provide adequate working capital and that the Barclays financing is a true working capital facility. he also admitted the title of the loan as a quality of life loan is actually not the best choice of words because it probably should have just been called a working capital loan.

And internal e-mails such as this one also demonstrate that the proceeds are not intended to provide an improvement of the quality of life for the citizens of Detroit but, rather, to provide general fund liquidity, which

is consistent with Mr. Buckfire's prior testimony. And here we have an August 29th e-mail that says use of the proceeds is to financing the swap termination and provide general fund liquidity through the Chapter 9 case.

Jim Doak from Miller Buckfire also admitted that this moniker "quality of life" was created by Jones Day attorneys in late August of 2013 after they had had discussions relating to the restrictions in the Gaming Act, and he testified that they were aware of these limitations under Michigan law and that they had attempted to structure the loan in such a way that the casino revenue pledge would be less controversial. And he also testified that some lenders were still concerned about the casino revenue pledge as was City Council. In fact, City Council had asked a question in writing when they were doing their due diligence into the Barclays loan, and they asked a question about under the Gaming Act, which lists the restrictions on the use of the wagering taxes, which category allows the use of wagering taxes to secure the swaps or the proposed financing, and the portion that's highlighted there, the city's answer was, "In connection with the proposed post-petition financing, the city intends to rely on the federal Bankruptcy Code to authorize the pledge of collateral, including the wagering taxes," which is not an answer, and in addition to their motion, their proposed order, Jim Doak's testimony, Ken

Buckfire's testimony, their internal e-mails and now this written response to City Council, there has never been a commitment to use the funds for any particular purpose.

The deposition that was filed today is one of Mr. Irvin Corley. He was the executive policy manager tasked with actually conducting the due diligence for City Council in relation to the Barclays financing, and he testified at his deposition that the emergency manager's consultants indicated to him during this due diligence period that the state gaming law would not allow the gaming tax to be used as a pledge and that there were concerns involving using the casino revenue as a pledge.

In conclusion, there's nothing in the evidentiary record to support the city's position that the casino revenue can be pledged as collateral in general in any case, nor is there any evidence that the quality of life funds in this case under the Barclays loan will actually be used for a quality of life purpose as required by the Gaming Act, and, in fact, the only affirmative evidence in the record clarifies that the funds are going to be used as nothing more than straight working capital throughout the Chapter 9 case. And the city made its bed by arguing that the scope of this Court's review is so narrow that it need not concern itself with how the funds are going to be used, but now the city has to lie in that bed, and, as a result, we're stuck with a

record that is barren of any facts that would satisfy this Court that the funds will be used in a purpose in accordance with Michigan law.

THE COURT: Thank you.

MS. GREEN: Thank you, your Honor.

CLOSING ARGUMENT

MR. BENNETT: Good afternoon, your Honor. Ryan Bennett with Kirkland & Ellis, and I represent Syncora. Your Honor, my colleague, Stephen Hackney, sends along his regards. This morning Mrs. Hackney gave birth to a beautiful baby daughter. Steve is at home in Chicago with the family.

So today in my closing, your Honor, I'd like to focus on the process that the emergency manager undertook in connection with the proposed DIP financing transaction. The objectors have decided to spend some time on this issue because we believe that the process surrounding the DIP financing is important both with respect to approval of the pending DIP motion and also with respect to the overall bankruptcy case.

The focus of my presentation, therefore, is on the flaws in the debtor's approach to date and how such shortcomings impact the finding of reasoned business judgment that the city is requesting from your Honor. In addition, I'd like to briefly offer some thoughts on the overall process and how the debtor's handling of the DIP financing

and -- has the potential to frustrate plan confirmation. In both the Section 364 and Chapter 9 context, the process is just as important as the substance, and to date we feel like there have been a number of flaws in the emergency manager's process made evident by the lack of any consensus around a Chapter 9 plan to date among the debtor and any of its creditor constituencies.

In sum, the purpose of my closing is not just to identify flaws, though, your Honor, but, rather, to outline a better process based on both the purpose and policies behind Chapter 9 and how other municipal debtors have handled their Chapter 9 cases in the past, specifically Orange County. In particular -- and I know the Court shares my view -- I think it's important that this process be one that focuses on consensus, something that has been clearly and unfortunately absent from the transaction in the debtor's overall process to date.

THE COURT: You're going to argue that any such loan should be in the context of plan confirmation?

MR. BENNETT: Come again, your Honor.

THE COURT: You're going to argue that any such loan should be in the context of plan confirmation?

MR. BENNETT: That's part of my argument, your Honor, yes.

THE COURT: Well, then I hope you'll address why

Congress would have made Section 364 applicable in Chapter 9.

MR. BENNETT: Sure, and that'll come up in the context of the Orange County discussion, your Honor. Thank you. So as your Honor clearly stated in the -- that its review in relation to the DIP motion will not include the city's proposed uses and needs of the DIP financing, and while that is a limited scope of review and we certainly respect it, the debtor still must show how it's exercised sound business judgment in soliciting, negotiating, and executing the DIP, particularly at this point in its case. The Court itself -- or the city itself acknowledged that review of the DIP motion pursuant to 364 requires the Court to analyze its business judgment. Specifically, the city noted that for the DIP motion to be approved, the city's business judgment cannot run afoul of the provisions of and policies underlying the Bankruptcy Code, and the main policy and purpose underlying Chapter 9 is to allow a municipal debtor to continue its operations while it refinances or adjusts its creditors' claims with minimum in some -- in most cases no loss to creditors.

So to ascertain whether the debtor's business judgment is reasonable, it's important to look at the DIP motion in the context of the broader proceedings. As a threshold matter, Syncora agrees that Detroit needs help. Many of its citizens need help, but the focus of this Chapter

9 case is a limited one. As this Court recognized in its eligibility ruling, the debtor's focus here and now should be on building consensus around a confirmable Chapter 9 plan, a plan that adjusts Detroit's balance sheet and allows it to have access to liquidity going forward. Substantial borrowing and spending may be necessary for the city's ultimate revitalization, but this case is first and foremost a debt adjustment process. As noted, Chapter 9 is and has always been a forum to restructure municipal debts in a consensual fashion where possible. This is a Bankruptcy Court sitting in Chapter 9. It's not some type of an emergency triage center for municipal ailments. It has a focus, which is debt adjustment through a plan, and we believe that should be the debtor's focus, particularly one that's built around and focused on consensus. The city's decision, unfortunately, is, instead --

THE COURT: What in the Bankruptcy Code says that there is a consensus required before the city can borrow money? 364 doesn't require that.

MR. BENNETT: No, but --

THE COURT: If Congress intended that, they would not have made 364 applicable in Chapter 9 but would have made a permissive provision of plans to borrow money.

MR. BENNETT: Yeah. Your Honor, I think it's a sequence issue and really that, you know, 364 is available to

debtors in Chapter 9. No doubt about it. But the key factor here is that the debtor, for whatever reason, decided to proceed forward with this 364 request before ever having any consensus developed in the case. As Mr. Ellenberg said --

THE COURT: What's the problem with that?

MR. BENNETT: It's actually creating angst and frustration in the bankruptcy case so that because of this, for whatever reason, hurried request, we have no consensus in the case. As Mr. Ellenberg said, his clients are the only ones to date that have reached any kind of agreement with this debtor when the real focus of this process and this case should be on forming consensus around a Chapter 9 plan. Instead, we've had the opposite. We've had an alienation of consensus, and --

THE COURT: So the Court should deny the motion because it's impeding consensus on the plan?

MR. BENNETT: The Court should deny the motion for that reason because it's a -- it represents a bad exercise of the debtor's business judgment or, alternatively, the Court could adjourn the motion to be heard in connection with the Chapter 9 plan once the city then focuses on consensus. Now, there are additional risks, and I will get into that momentarily, but, your Honor, so far the date has really -- the focus has really been on these piecemeal motions, these one-off transactions that have really all worked against the

consensus that we all want to reach in the context of this Chapter 9 case. The assumption motion was the first example. Then we had the Public Lighting Authority motion as the next, and now the DIP is the latest iteration. What's next? Will it be the art collection? Will it be the DWSD? I don't know what other, you know, more transactions need to be negotiated on this one-off basis outside of the creditor body's consensus and protections that are afforded to it through a Chapter 9 process.

THE COURT: I will ask you what I asked Mr. Hackney --

MR. BENNETT: Um-hmm.

THE COURT: -- when you raised the same issue about public lighting. Is it your position that the people of the City of Detroit have to wait for safe lighting for a plan of adjustment?

MR. BENNETT: Your Honor, if the emergency manager wants to implement initiatives, he can under state law. All right. Like your Honor has recognized, like the debtor has argued multiple times, 904 provides for that opportunity. All right. He does not need to come to the Bankruptcy Court if that's what he's trying to do. And if that -- and if he has -- now, he does, to a degree, do so at his peril to the extent -- and as I'll talk about with the Fano decision out of the Ninth Circuit, to the extent you're alienating value

to the detriment of creditors outside of a plan, you do create potential confirmation problems down the road, but to the extent the emergency manager needs to focus on initiatives such as public lighting, such as police, he can. He's protected. You know, he has the -- he has the -- you know, like I said earlier, this is a limited forum, I think your Honor has recognized. The thing is that he keeps coming back to you for things like good faith findings, for, you know, various other Chapter 9 bankruptcy relief that implicates issues such as -- you know, that would really put us more appropriately focused on a Chapter 9 plan. Now, again, like I said --

THE COURT: So the answer to my question, if I understand you correctly, was if the emergency manager decides that authorization from the Court is either necessary or appropriate, then, yes, the citizens of Detroit have to wait for plan confirmation? Do I have that right?

MR. BENNETT: Yes, your Honor. I think that's the appropriate use. Your Honor doesn't have to. Okay. Your Honor can enter an order approving this stuff now, as you're fully aware. There is a problem, though, there. Number one --

THE COURT: I'm asking you -- I'm asking your client's position on these questions.

MR. BENNETT: Yep.

THE COURT: So the citizens of Detroit have to wait for safe lighting when the city manager -- or the city emergency manager decides that it's necessary or appropriate to get court permission because that then would have to wait for plan confirmation?

MR. BENNETT: If the citizens -- if the City of Detroit wants to get out of bankruptcy quick -- in an expedient fashion, then it should wait before it gets that type of relief because what this is doing -- what these one-off motions are doing is creating angst and discontent among the creditor pool and potentially alienating --

THE COURT: What about the safety of the citizens?

MR. BENNETT: Pardon?

THE COURT: What about the safety of the citizens?

MR. BENNETT: Like I said, then Mr. Orr doesn't need to come to your Honor for the relief; right? He can just implement initiatives in his governance capacity of the city. The emergency manager statute is very broad.

THE COURT: So in deciding between necessary and appropriate process in Bankruptcy Court and citizen safety, he's got to choose one or the other?

MR. BENNETT: If he wants to move forward on an initiative for the benefit of the citizens, he can do so outside of Bankruptcy Court. To the extent he wants to come to Bankruptcy Court, he needs to remember what the focus is

about, and it's about debt adjustment through a plan with the protections associated with a plan and plan confirmation. These one-off approaches outside of that context are stretching out this process and potentially --

THE COURT: How is it stretching out the process?

MR. BENNETT: -- endanger -- your Honor, we're six months into this bankruptcy case, and there is zero consensus at this point among the city --

THE COURT: What about the process?

MR. BENNETT: -- and its creditors. The city should have been focused on a plan up front instead of spending all this money and focus on these one-off transactions that are the antithesis to it, that really are alienating creditors in the process, so the --

THE COURT: Where's the evidence of that?

MR. BENNETT: Well, the fact we don't have any consensus standing here.

THE COURT: Where's the evidence of that?

MR. BENNETT: None has been announced, none that I'm aware of, your Honor.

THE COURT: Wasn't there a major announcement by the mediators today of a consensus?

MR. BENNETT: There was an announcement about a potential deal around art. I don't know if anyone, including the potential beneficiaries of that deal, are on board with

that arrangement. I mean it was just a kind of --

THE COURT: Well, but it's progress.

MR. BENNETT: Potentially. I don't know, your Honor.

THE COURT: All progress is potential until it's done.

MR. BENNETT: Um-hmm. Now, I'm trying to make some -- I'm trying to understand why the -- hang on -- excuse me -- why the city is focused on going forward with these what I've called piecemeal motions. There we go.

THE COURT: Okay.

MR. BENNETT: And --

THE COURT: One second, sir. Okay. Go ahead, sir.

MR. BENNETT: Okay. Sure. And a lot of it is -- comes out of some of what Mr. Buckfire said during his testimony that time is not the city's friend, it's got to move forward with this forbearance agreement, yet that record failed to establish really anything that sounded persuasive in terms of why the city should move forward with this transaction right now, both the forbearance agreement and the DIP, recognizing that they both are contractually tied. Mr. Buckfire noted the delay between executing the forbearance agreement in June and the present day worked in favor of the city as interest rate -- rising interest rates have reduced the swap termination payment. He also conceded

that it would be economic irrational -- economically irrational for the swap counterparties to exercise their optional early termination right as long as they were in the money. He recognized that, so I don't know where the rush comes from in the context of needing to have this forbearance agreement and DIP dealt with now versus in the plan once we've got some consensus around the table, your Honor. The city -- the evidence at trial failed to show that.

You know, we also hear things about that there's this 18-month term for Mr. Orr, you know, and that's used in various contexts to describe why the case needs to move faster and transactions such as the DIP and the forbearance agreement need to be expedited, and, you know, Mr. Orr's testimony, Mr. Buckfire's testimony supported that, that that's the city position, but the key thing is is that Orr's term does not expire in 18 months. The City Council can remove him by two-thirds vote, but even if they were -- okay. And we know who the City Council is. And even if they were -- okay -- we know, you know, what their position is on a lot of issues, but even if they were to remove him, the governor can put somebody new in place -- all right -- because the governor can decide that the emergency situation has not been fixed, and we can -- and we can remain in emergency management until the consensus is developed and the case is executed.

Now, as a result of this kind of hurried approach, right, to the forbearance agreement and the DIP financing, you also have just some breakdowns in just the process around the DIP in general, as Mr. Marriott pointed out earlier; right? We've got a clear hole in the approach where the city failed to look for unsecured financing where in a scenario like this, it probably -- I would think that that would be a probable course where you've got administrative superpriority status available to you, designated revenue streams. That would seem to be at least something worth asking a couple questions.

THE COURT: What's hurried about the Court's consideration of a motion in -- a DIP motion that was filed on the first day five months later?

MR. BENNETT: I'm sorry. Can you say that one more time? I apologize.

THE COURT: What's hurried about the Court's consideration of a motion that was filed on the first day of the case five months later?

MR. BENNETT: What's hurried about it is that it's ahead of the plan, which is the main focus of a Chapter 9 case and should be all of our focus. And it's distracting, and it's taking away the city's resources, and it's alienating its creditor constituents where all that energy could be focused on the end game, which is a Chapter 9 plan.

Now, as further evidence that the city's approach -- the emergency manager's approach to the transactions are outside of its sound business judgment, the City Council, the only elected officials involved in the DIP process and arguably the people most familiar with the interests of the citizens of Detroit, emphatically rejected the DIP financing. City Council made detailed findings with respect to the proposed DIP financing, and they filed those on the docket, and I'm sure your Honor has reviewed them. Among those findings are that the proposed DIP financing transaction is an extremely complex deal on a number of fronts. It does not seem to be in the best interest of the city. The DIP appears to be, quote --

THE COURT: I actually have not reviewed that document. Is it in evidence here?

MR. BENNETT: It is. It's EEPK Exhibit 805.

THE COURT: 805? Thank you.

MR. BENNETT: The DIP appears to be putting the interests of lenders before the interests of the city and residents, end quote. The goal seems to be to ensure protection of the lenders at the detriment of all other interested parties, end quote. The presentation -- or the resolution goes on. The city still moves forward notwithstanding the City Council's political decision in that regard.

Now, notably the city has correctly pointed out that in the course of the process, my client, Syncora, did provide a DIP proposal to the City Council, and, now, unlike Barclays, my client is an incumbent creditor in this case, and unlike the swap counterparties, we are long in Detroit. We are going to be here, and we're not looking to exit. All right. And so we had to look at the various alternatives that were in front of us at the time understanding that we, unlike the debtor, do not dictate the process and approach, and we needed to explore contingency plans.

THE COURT: Better than Barclays' deal?

MR. BENNETT: The city determined it was not, it was not better, and the City Council -- I'm sorry.

THE COURT: I'm asking you.

MR. BENNETT: I do think our deal was better than the Barclays deal, yeah --

THE COURT: How?

MR. BENNETT: -- your Honor. Because, among other things, we had a lower -- well, let's see. What did we do? We had a -- we did not put restrictions on the asset sales, on the city's ability to make asset sales and what would happen with those proceeds, including -- and we also improved our rate so that it was consistent with Barclays' rates, reduced the fees that we'd previously put in there, but I believe there was a determination that for whatever reason we

were not up to snuff in terms of our --

THE COURT: I want to make sure I understand your position. Is it your position that the city, in proposing this lending, did not exercise sound business judgment because there was a better offer on the table --

MR. BENNETT: No.

THE COURT: -- from your client?

MR. BENNETT: No, your Honor, no.

THE COURT: Oh, all right.

MR. BENNETT: This is merely a footnote. I think this is -- we would want -- we want this DIP denied. We want no DIP in the case, all right, not ours, not anybody's, but we recognize --

THE COURT: No DIP? Okay. Why did you offer one then?

MR. BENNETT: No. That was where I was going with my point is that we did it because we did it as a contingency plan because we knew that -- we knew that we didn't control the process and it was likely that even when we make our objections here, were -- you know, were it to be unsuccessful, and if we've got an alternative in place, which is an alternative DIP, it gives us a fallback. Like I said, we're an incumbent creditor, so -- so I mentioned earlier Orange County, so the only other major DIP post-petition financing in Chapter 9 that we've been able to locate is

Orange County, and it was a significant number, 278 million, back in '95. Now, the difference, though, is notable in the context of when you compare where Orange County was in the context of its Chapter 9 cases versus where Detroit is today, so in Orange County, unlike the present case, the DIP financing had significant creditor support. It did not prejudice creditor recoveries and was negotiated in a transparent manner as part of a settlement that facilitated a resolution of all claims -- nearly all claims in the case. The Orange County proposal came later in the case, in the bankruptcy case, and closer to a plan, and a plan which provided for full creditor recovery. That's the significant difference, your Honor. Here you have creditors who to date have just seen the June 21 proposal which shows their unsecured recoveries getting significant impaired, and Orange County, on the other hand, had a scenario where those creditors got a hundred cents on the dollar.

Now, in further contrast -- I mean at this point the city's DIP has virtually no support, no creditor support, and was negotiated behind closed doors with little transparency, and there's almost no claims except those of the swap counterparties and at the same time allows 285 million to come on top of the capital stack to the prejudice -- to the potential prejudice and the prejudice of creditor recoveries, so this takes me to what I mentioned earlier, which is the

part about where I talk about how debtor's plan confirmation prospects are being permanently prejudiced. As courts have recognized, preplan expenditures by a Chapter 9 debtor may threaten the debtor's ability to confirm a plan of adjustment, and this is specifically the Ninth Circuit decision in Fano where the Fano -- where the water authority took -- the irrigation authority took money during the case and before the plan and spent it toward improvements for the -- excessive improvements toward the irrigation facility and then came later to the Bankruptcy Court in the context of its plan and said, "Look, your Honor, we only have 'X' amount of dollars left for creditor recovery, and that's what the recovery should be." Here we're concerned that a similar situation is going on. Because you have a part of the loan, at least, that's being used to fund improvements or rehabilitation and by so doing incumbering previously unincumbered collateral, we're creating a situation where there may be potential problems down the road when that collateral has been incumbered and, thus, removed from creditor recoveries, and -- all outside of the context of a Chapter 9 plan.

We don't think the debtor should be able to carry out this reinvestment initiative largely at the expense of creditors outside of the plan. The city's creditors, its retirees, they're entitled to the protections of a Chapter 9

plan, and outside of that context, there's significant opportunity for prejudice where the creditors do not have the ability to buy in with voting, with -- do not have the fundamental protections as best -- for best interest of creditors, for fair and equitable. Those tests -- those protections are not available, and there's a risk that creditors' interest can be prejudiced in the process.

You know, I think it's important to note that Detroit's creditors, unlike stakeholders in a traditional Chapter 11 reorganization, do not stand to benefit from the city's additional borrowings under the quality of life note. Indeed, pursuant to the DIP motion, new borrowings will be layered on top of existing creditors and used to fund civic improvements and services which will not inure to a large portion of the city's creditors' benefits. This is unlike a scenario in Chapter 11 where creditors -- pre-petition creditors might be receiving new stock, right, of the reorganized company.

THE COURT: Won't the city's revitalization enhance its ability to pay its debts back?

MR. BENNETT: That's not been clear to us from the testimony, your Honor. It looks as if this money is going out the door and not turned into any type of revenue-generating alternative, at least not for purposes of paying off our claim or for plan recovery on any of our claims,

certainly not for purposes of the presentation that was given to us on June 21 either. In that scenario, our recovery was fixed as of that date, so whatever the city did with its value and alienated that value, it did not inure to our benefit.

So, your Honor, in closing, we think that the city's business judgment would be more appropriately and responsibly exercised by abandoning this current tack of engaging in one-off preplan transactions that consistently result in substantial opposition and extensive litigation, discovery and appeals, instead focus on building consensus around a plan of adjustment that adjusts the city's balance sheet and cash flows enabling it to access the liquidity it needs to rehabilitate after it gets out of bankruptcy. This Court should deny the DIP and the forbearance agreement motions or at least adjourn them to be consistent with plan -- to be commensurate with plan confirmation. Barclays is not going anywhere. If they do, then we can just work our way down Mr. Doak's list till we find somebody who wants to stick around, but it was pretty clear that Barclays is focused on the exit financing, and this can get rolled in -- this ultimately is part of a plan. The DIP should and would be exit financing. The swap counterparties, they're not going anywhere either. They're on their sixth amendment, and they're not going to trap cash. And if they try to trap cash, trust me, Mr.

Hertzberg can get a TRO. Okay. We know from experience. And so I don't see the -- we don't see the imminent threat, and we think that the proper course really for this city for its citizens would be to secure the rehabilitation through a rapid -- a more expedient exit from Chapter 9 rather than trying to do the rehabilitation during Chapter 9 prior to the exit. That's all I have, your Honor.

THE COURT: Thank you, sir.

MR. BENNETT: Thank you, sir.

CLOSING ARGUMENT

MR. GOLDBERG: Good afternoon, your Honor. Jerome Goldberg appearing on behalf of interested party, David Sole. I first wanted to begin by -- your Honor asked Ms. English, I believe, what the disgorgement amount was that would be being pursued if the city was able to succeed in that, and I believe the testimony of Mr. Orr was that that amount was 247 million covering the amount that was paid on the swaps from 2008 to 2012, and that's also documented in the June 14th financial report. I think that's 1316, Exhibit -- our Exhibit 1316. It also included approximately 50 million that was paid this year, so it would be in the neighborhood of $300 million in terms of recovering on what has already been paid on the interest rate swaps.

In addition, your Honor, at the hearing on -- pretrial hearing on December 13th, your Honor laid out how

the Court's role in this proceeding is to determine whether the settlement is fair and equitable and whether it is in the best interest of the estate as a whole. Your Honor stated you look at -- the Court looks at what the impact of the settlement might have on the plan process on the city and public's interest in reconstruction and revitalization. Your Honor, I would submit that the -- paying $165 million in a termination amount that goes really to two banks through a third bank, Barclays, at an interest rate that's anywhere from 5.5 to 8.5. percent totaling, as Mr. Orr testified, approximately $30 million to pay off this loan with a $4.2 million breakage fee for a total of about $200 million hardly will help the citizens of Detroit in the revitalization process moving forward. In fact, what it does is pledge 20 percent of income tax revenues for the next four years of $4 million a month or $48 million a year, and in the city's motion -- and Mr. Orr acknowledged this on testimony -- the city's income tax revenue is approximately 232 million. It means that 20 percent of income tax revenues that can be used for revitalization and reconstruction of the city, that can be used to turn the lights on, get the busses running, providing services and also pay pensioners and workers what they're due instead will be diverted to UBS and Bank of America through Barclays. I submit that that is not -- I mean especially when you balance that against a potential

recovery of $300 million, it hardly feels to me like that is in the best interest of the citizens of the city and reconstruction and revitalization.

In his testimony, the other objectors have eloquently, you know, gone through many of the issues that were raised in terms of why the swap agreements can be challenged on the basis of statutory grounds whether under the Bankruptcy Code or under the state law. I would just remind the Court that Mr. Orr also testified that the city had drawn up a complaint not just dealing with those issues but raising, rather, what I would call equitable issues. He testified that the city -- testified that his attorneys drew up a complaint against UBS and Bank of America alleging, among other counts, fraud, unjust enrichment, and breach of contract based on a breach of the implied duties of good faith and fair dealing and that they were ready to file that complaint if no agreement was reached. The fact that they were ready to file that complaint indicates that they believe that it was a substantive complaint; that there was a basis for that complaint to move forward, and I believe that kind of satisfies the standard, at least initially, in this motion whether this motion was to determine whether a factual predicate in a summary way of what the claim would be. The fraud count was, in part, based on problems with the LIBOR index, as testified to by Mr. Orr, and is documented based on

UBS's admission of fraud in dealing with the LIBOR, which is well-documented.

In addition, the claims were based on the following scenarios: one, that the counterparties had superior knowledge when they entered into this complex financial transaction with the city and had a duty to make clear the terms of the transaction; that the counterparties misrepresented that there was a low risk of default and termination in connection with the swaps; that Bank of America and UBS did not explain to the city the potential dangers that a termination event would mean for the city -- i.e., that the city could immediately have to pay tens of millions or hundreds of millions in interest payments and the termination fee; that the city was a ticking time bomb, as Mr. Orr described it, for a default based on the lowering of the city's bond rating because of the city's financial history; and that the fact that the city's chief financial officer, Sean Werdlow, took a job with SBS, one of the counterparties at the time, who was backed up by Merrill Lynch, approximately five months after the swaps were transacted raising a red flag.

It should be noted that in -- Sole Exhibit 1328 is the July 31st, 2012, SEC Report on the Municipal Market -- Securities Market. All of these claims that the city was drawing up in its complaint to go after the swap

counterparties for disgorgement to recover -- to at least disallow or subordinate the claims and even to go after a recovery of the money that's already been paid, the 300 million that's been paid to the counterparties, are consistent with what is reported in this report, in this SEC report, and I would urge your Honor to take a look at pages approximately 92 to 105 of that report, which deals with swaps specifically. That report outlines a series of SEC actions that have been carried out against -- around these issues. It lays out the actions that have been taken out that led to settlements, and they included settlements against -- in the Orange County case. They included settlements in Jefferson County. They included settlements and judgments against five -- enforcement actions against five major financial actions, Bank of America, UBS, JPMorgan, Wachovia Bank, and GE Funding Capital, for their role in interest rate swaps. And most of these actions dealt with the precise issues alleged by the city, lack of transparency to the inequality, the difference when you're dealing with a financial transaction of this magnitude between a municipality and a bank in terms of understanding it, misrepresentation of the risk of -- that are incurred by a termination event that can have drastic effects, especially in a city like Detroit, which, as Mr. Orr stated, was a ticking time bomb because of its precarious financial

situation. It detailed potential bribery. That was an issue in Jefferson County, improper dealings with the -- with city officials in the context of securing the swaps, and it detailed also issues dealing with municipal bond rigging. In fact, another exhibit that we've attached to -- that's been admitted in this case is a final judgment -- it's Sole 1321 -- on UBS municipal bond rigging that, interestingly enough, one of the bonds cited was one of the Water Board bonds in Detroit.

Based on the fact that, again, the -- at this stage, as your Honor indicated, the proceeding was not to take testimony to prove these claims but to say whether a predicate had gone -- was made to move forward on these claims, and we believe the Orr testimony, when viewed in the context of similar claims that have been carried out in connection with municipal bonds and especially interest rate swaps all over the country lays that predicate to move forward and to not resolve this case and remove the swaps from the purvey and jurisdiction of the Bankruptcy Court at this time.

But there's another issue that I think is important to look at when we examine the swaps to put them in their proper context. In Pepper v. Litton, 308 U.S. 295, the U.S. Supreme Court held that the Bankruptcy Court -- that this Court -- the Supreme Court has held that for many purposes,

courts of bankruptcy are essentially courts of equity, and their proceedings inherently are proceedings in equity. They have been invoked to that end so that fraud will not prevail; that substance will not give way to form; that technical considerations will not prevent substantial justice from being done. A claim which has been disallowed may be later rejected in part according to the equities in the case. Disallowance or subordination in light of equitable considerations may originally be made.

In examining the equities involved with the swap, I think you can't separate them from the context in which these swaps took place. The fact is Mr. Orr testified -- and it's well-documented -- that these swaps became a disaster for the City of Detroit beginning in 2008, and what happened in 2008? As Mr. Orr acknowledged, there was a financial collapse that took place in this country and that he admitted -- and I think it was somewhat enlightened in his admission -- that it was in part a product of the subprime predatory lending policies carried out by the major banks across the U.S. And, in fact, the precipitous drop in interest rates occurred when the government intervened and the Federal Reserve intervened to stimulate the banks, essentially bail them out of their failed policies and their fraudulent policies, and one of the asterisks of the bailout, as Mr. Orr testified, was the purchase of $1.7 trillion in mortgage securities. In other

words, what happened in 2008 and the reason these swaps became a disaster for the city was that interest rates went down precipitously. They went down to zero, virtually zero, and it was that gap between the floating rate tied to the LIBOR and the fixed rate that caused the disaster that cost the city $300 million already and potentially will cost the city $500 million if this agreement is approved.

Exhibit 1326 to the motion hearing is a report by the City of Detroit Planning & Development Department, Neighborhood Stabilization Program Plan, and what it indicates is Detroit almost more than any other city was devastated by the subprime lending policies of the major banks. And if there's any question that there was fraud involved in these policies, I call your attention to Exhibit 1324, which is excerpts from the Senate Subcommittee Report on Wall Street and the Financial Crisis.

The Exhibit 26 notes that from 2004 to 2006 73 percent of new mortgages written in Detroit were subprime mortgages. In 2006 that means they're three percent above the prime. As of 2006, 29,000 adjustable rate mortgages or nine percent of all existing mortgages reset triggering higher payments for loan recipients, and in the case of Detroit, many of these loan recipients were on a fixed income. It resulted from 2005 to 2007 in the City of Detroit experiencing 67,000 mortgage foreclosures with two-thirds of

the homes foreclosed upon staying vacant. It was this imposition of subprime lending on Detroit that caused the financial collapse in many ways, the immediate collapse in the City of Detroit, and the idea -- the idea that the same banks who participated in these lending practices that had such a devastating consequence on the City of Detroit are now to be paid $165 million with a pledge of 20 percent tax revenues is inequitable and unconscionable.

In fact, my client, Mr. Sole, is here today. He asked me to intervene in this case because he not only is a City of Detroit retiree facing a reduction of his benefits, as is his wife, but he lives on a block on the east side of Detroit which was a thriving residential block ten years ago, but today there are five families -- five homes left standing out of twenty on that block. The home next to his is boarded up on the right; it's boarded up on the left. Across the street there are two boarded up and a third one that's occupied by a flock of wild dogs because they didn't -- the banks didn't even bother boarding it up after foreclosure.

That's the impact of this crisis that's being felt by the people of the city, and I think in viewing the equities of this case it can't be separated. It isn't just about numbers. It isn't just about form. It isn't just about detail. And as a court of equity, it's important to view how are we going to move Detroit forward, and moving --

Detroit would not move forward if the banks who helped precipitate this crisis through their lending policies become the beneficiaries of 165 million -- really 200 million in a loan that takes them out of the bankruptcy when there's a potential to go after them, and I was excited when I heard Orr actually raise that.

The last point I would raise, in pursuing this litigation, Emergency Manager Orr said that he could bring in -- that he had contacted the SEC, and under the Bankruptcy Code specifically in Chapter 9 the SEC could intervene into this bankruptcy. It could help conduct the investigation of these swaps and these lending practices. The cost wouldn't just be on the city, but they would come in, and the government could come in and aid us in that if a request was made. Unfortunately, that request was not made till after August 30th, but I'm glad to hear that the request has been made and they've indicated interest, based on his own testimony.

Let me just end by saying there are a number of cases that I could cite that show how -- BKB Properties versus SunTrust Bank. It's a 2009 U.S. District, Lexis 16284, where the Court then -- in the U.S. Eastern District the Court allowed a fraud in the inducement claim based on the fact that the bank was a far more sophisticated entity that brought a sub -- a swap transaction and allowed that to

be a basis and indicator of a claim for fraudulent inducement. in Yellowstone Mountain Club versus Official Committee of Unsecured Creditors, 2009 Bankruptcy, Lexis 2047, the Court allowed a claim for equitable subordination to go forward on the basis that the creditor, the bank -- that its policies relative to the entity who was -- received the loan was at a far unequal basis and, in fact, that they could see no basis for laying out this loan except the greed of the bank, and that was a basis for finding equitable subordination.

So I will end here, your Honor. I appreciate it. I think this has been a very important proceeding for the Court, and I appreciate that the Court treated it with the significance it belies because the question here is whether the banks -- at a time when the people of Detroit are facing terrible services, when we're barely surviving, when our lights aren't on, when services are being cut, when retirees are fearing the loss of pensions, to sit back and make a payment of 165 million to UBS and Bank of America, banks with a history of subprime lending that helped cause this crisis, seems unconscionable and will not allow the city to go forward. If this is examined, it's going to cause a great deal of consternation in the city, and we would hope that the Court rejects this and allows the Court to move forward to deal with these issues in the bankruptcy proceedings in a

proper examination of the whole issue. Thank you.

THE COURT: Thank you, sir. Any other remarks from objecting parties?

MS. ENGLISH: Could we just --

THE COURT: How much time is left?

MS. ENGLISH: Could we just have five minutes, your Honor?

THE COURT: I'm sorry.

MS. ENGLISH: Could we just have five minutes to make sure we're done?

THE COURT: But to answer the question, you have 25 minutes remaining.

MS. ENGLISH: Okay. Thank you, your Honor.

THE COURT: All right. I'll just sit here while you decide.

MS. ENGLISH: That's fine. Thank you. Thank you for the time, your Honor. Mr. Marriott would like to address the Court.

MR. MARRIOTT: Good afternoon. I'm sorry.

THE COURT: And you may proceed, sir.

MR. MARRIOTT: Good afternoon again, your Honor. Vince Marriott, EEPK. I wanted to briefly address one point that you made in response to Mr. Bennett's argument, which was how can -- in effect, how can you ask the city to choose between the safety of its citizens and its creditors. And I

just wanted to indicate that we're not callous, and we're not suggesting that the city play Russian roulette with its citizens. It is not our position that the city should just become starved for cash and collapse. If you recall, before this hearing commenced, the Court ruled that under Section 904 of the Bankruptcy Code it was not the province of this Court to pass judgment on the need of the city for borrowed funds or for the uses to which the city planned to put those funds. As a result, the objectors, although ready to do so, put in no evidence on those issues. I just think it is important to know -- to put in context the arguments we've made today that had we been entitled to put that evidence in, we would have put evidence in that, in our view, there's not an immediate need for funds to meet what the city is immediately capable of doing, and so we are not -- we would have, had that issue been amenable to evidence from the objectors -- I just think it's important for the Court to know that we are not operating from a perspective that it's choose between the citizens and the banks. We believe, based on our own analysis, that the city is actually not at this time confronted with that choice.

THE COURT: All right. Thank you. Anything further? All right.

MS. ENGLISH: Thank you.

THE COURT: All right. Will the city be giving a

rebuttal argument?

MS. BALL: Yes, your Honor.

THE COURT: All right. Before we do that, we'll take a 20-minute recess and reconvene at 2:50, please.

THE CLERK: All rise. Court is in recess.

(Recess at 2:32 p.m., until 2:52 p.m.)

THE CLERK: All rise. Court is in session. Please be seated.

THE COURT: Looks like everyone is here. You may proceed.

MS. BALL: Good afternoon, your Honor. Corinne Ball of Jones Day for the city. Your Honor, may I inquire as to how much time we have?

THE COURT: Sixty-eight minutes.

MS. BALL: Thank you, sir.

REBUTTAL ARGUMENT

MS. BALL: Your Honor, we have before you today two motions, one to approve forbearance and optional termination agreement and the other to approve a post-petition financing. The point of these motions is to enable the city to rationalize its debt structure and restore viability to the city by eliminating its most costly obligation and obtaining financing on a cost-effective basis to move forward.

Your Honor, these matters are before you as core matters under 28 U.S.C. 157(b)(2)(A), (B), which is the

allowance of claims, your Honor, (C) the obtaining credit, (K) the extent of the lien, and (O) the adjustment of debtor and creditor.

Your Honor, I'd like to take some time, since the evidence here after three days but more so of voluminous documents may have escaped even Ms. English's notice as to some points that might help the Court where there was evidence for points where she suggested that there weren't, but I must admit, as you know, we agree with Ms. English and Mr. Gordon to the extent that we fully understand -- and we think we do -- one of his arguments that there are litigable claims here. We do not disagree. I think we just, in the context of the city and its current circumstance, may have a different conclusion as to what's in the best interest of the city.

But with that, your Honor, I'd like to start with the post-petition financing and address the objections of Mr. Marriott that we did not demonstrate that unsecured credit was not available, the objections of Mr. Perez that the good faith findings aren't merited, Mr. Marriott that we didn't comply with 436, and a new one from Ms. Green on the authority for granting liens, which, as your Honor may recall, the authority that we are seeking for the provision of this pledge are authority to pledge under 364(c) as a matter of federal law.

Finally, your Honor, in terms of the purpose of Chapter 9 and Mr. Bennett's comments, I think we are really reminded -- and we will get there because we did talk about it in our reply -- the primary purpose of Chapter 9 is to restore viability of the city, and by that it means the provision of public services at the level it deems necessary, meaning the city, not its creditors. Well, your Honor, with that, moving ahead, I think the evidence has shown that unsecured credit is not available to the City of Detroit and the post-petition financing is the best financing available. Your Honor, we have excerpted opinions from Mr. Doak and Mr. Buckfire. And I would point out to your Honor that your Honor did qualify Mr. Doak as an expert in sourcing financing in municipal cases, and, your Honor, the reference for that is December 17th's hearing transcript at 250, lines 10 through 12, despite some questions from Mr. Marriott on that point. Mr. Buckfire also qualified as an expert in restructuring finance on December 17th at 131, lines 12, through 132, lines 21.

In addition, your Honor, I would point out that during December 18th's hearing Mr. Buckfire, after being qualified as an opinion, was asked,

"Question: And in the process of going out to seek this DIP financing, did you consider the idea of seeking unsecured financing?

Answer: We thought about it and dismissed it as impractical.

Question: When you said you dismissed it as impractical, why is that?

Answer: Well, again, based on my experience, I've never seen any post-petition financing done on an unsecured basis. Lenders in this field always want security. They're not going to take what I would call plan risk. If there were an unsecured lender, they would be taking that, and I don't think there's any case I'm aware of where that's been done."

Your Honor, if we move ahead, I think we've had the discussions regarding the JPMorgan Exhibit 61. This was one of the preliminary market tests that Mr. Buckfire testified to, and it is true that they did identify general revenue sources. I think the document speaks for itself, but it clearly was another information point that informed the opinion of Mr. Doak -- Messrs. Doak and Buckfire. And we find it interesting, your Honor, that no objector could bring in any witness, expert or otherwise, who would tell this Court that their bank or financial institution was willing to lend on an unsecured basis. Indeed, as your Honor elicited from Mr. Bennett, the proposal from Syncora was secured as well and on that same basis with the exception of asset

proceeds.

Your Honor, then in discussing this with Mr. Orr, who ultimately had to make the decision, and it's his business judgment, we excerpted the evidence where it is clear that Mr. Orr had also discussed the basis and the credit available and what he was looking for. And, your Honor, I think he was quite clear that he was looking for the best deal available for the city. If we move ahead -- and I think Mr. Marriott mentioned the next exhibit, which was City Exhibit 88 -- we think the evidence has shown that the city has undertaken a robust competitive process. The terms and conditions of the post-petition financing are fair and reasonable, reflect the city's best business judgment, and are supported by reasonably equivalent -- excuse me -- equivalent value and fair consideration. The evidence does establish that the city solicited 50 banks and financial institutions. It received 16 lending proposals. And as your Honor can see from page 5 of City Exhibit 88, the Barclays proposal was by far the strongest proposal. Even after that, the city would go on, as was clear from City Exhibit 89, to fully negotiate four commitment letters, and, your Honor, all of those were also secured. And what I wanted to take time with page 5 of this exhibit to share with your Honor is please note that Barclays again, even with flex, is by far the best proposal. And one might suggest to you, your Honor,

that, indeed, the fact of including a flex provision, which the two most competitive lenders did, in fact, do, as you can see from this exhibit, confirms that unsecured debt would not have been possible if even, in fact, on a secured basis we would have market flex to this extent.

I do want to add on a happier note that Mr. Orr also testified on December 18th that he was confident that we would be able to arrange exit financing for this loan rather than the scenario outlined by Mr. Goldberg. That four-year scenario outlined again by Mr. Goldberg, your Honor may recall, was a product of a limitation that we couldn't possibly have a lender who was enforcing against the city in any way that would inhibit the city's ability to provide services. So, your Honor, I think the evidence has established that the Barclays proposal is the best available. In fact, I've excerpted for your Honor's benefit the testimony of Jim Doak to that effect and, again, underscore that we provided limited collateral. It was a fully underwritten commitment by a major financial institution, and it was the most advantageous. In fact, Mr. Doak would go on to tell us that even with the market flex, it would still be the most advantageous proposal, and, in fact, he's confident that no party was willing to provide comparative overall better terms.

Moving on to the issues raised by Mr. Marriott under

436, your Honor, the city believes and has demonstrated that the City Council received more than adequate and sufficient information to assess the Barclays proposal, and for your Honor's benefit we have identified those portions of Mr. Doak's testimony where he confirms in his meetings with the individual City Council members -- and, your Honor, the materials for those meetings were City Exhibit 90 -- that he, in fact, did say that the range, even with market flex, was well within the range described to in those materials, and that range, your Honor, was five to nine percent, which more than covered the market flex ranges that we've just gone over on Exhibits 89 and 90. He also -- again, they did it with the City Council in closed session.

Mr. Doak would then go on to tell us that not only did he talk about the market flex, but, although Mr. Marriott is adamant that he didn't give them the fee letter, which is true, Mr. Doak has testified that he discussed the commitment fee that the city agreed to pay with Barclays. "And did you disclose it?" And he said, "Yes, I did." So, your Honor, I think --

THE COURT: Well, but did he testify that he disclosed to the City Council members the market flex process?

MS. BALL: He said -- no, your Honor. He said that he assured the individual members of the City Council that

the interest rates that would result from the Barclays proposal were well within the range that he provided in his materials, which were five to nine percent, which was, in fact, the range of the market flex, your Honor, if you were to look --

THE COURT: So without disclosing the market flex process --

MS. BALL: He did --

THE COURT: -- the consequences, how is that consistent with what PA 436 requires?

MS. BALL: He disclosed the range of possible consequences should flex be invoked, five percent being where no flex was invoked, which would be the best outcome to the city, and nine percent, which would be the range and the all-in cost should the flex be invoked with the fee. So I think if the City Council were thinking about an alternate proposal, they knew the range that this proposal would, indeed, cost. That was discussed as was the commitment fee, and, your Honor, we do think that is sufficient for that purpose. Your Honor may recall that market flex -- there's some commercial sensitivity around market flex, and perhaps we were a little over-sensitive to that, as your Honor's later ruling would confirm, but in terms of the consequences and impact of this Barclays proposal, the spreads were, in fact -- at the bookends of the proposal were, in fact,

discussed with City Council members as was the commitment fee.

In addition, your Honor, beyond going through the process Mr. Marriott described, which was giving the City Council notice of the proceeding, which, as we said, there were two series of meetings, individual meetings and then the closed session, City Council would then have time to submit an alternate proposal. The City Council did not approve the post-petition financing, as your Honor is aware, but it did not offer any alternate proposals either. In that case, the next step indicated under the Home Rule City Act was for the emergency manager to seek approval from the Emergency Loan Board. And, your Honor, we have excerpted an image of the order of the Emergency Loan Board, which was entered on December 20th after hearing, approving this post-petition financing with certain conditions. Primary among the conditions, your Honor, is your Honor's approval. Paragraph 7 of that order authorizes the city to issue bonds in an amount not to exceed 350, in fact, recognizes at that time that the transaction might be shifting with the swap parties and, indeed, further qualifies its approval and conditions it on your Honor's approval of the settlement.

THE COURT: Can you please pull the microphone closer to you?

MS. BALL: Of course. My apologies. With that,

your Honor, I think that we would conclude that we have met our burden on the post-petition financing. We seek your Honor's authorization under 364(3) to grant the liens and the priority claims that are described in our papers. We also, based on the robust process that we followed, seek your Honor's findings that the process was, in fact, in good faith. The matters raised by Ms. Green when she excerpted the financing orders talk about the grant of a lien under Section 364, your Honor, and that authorization under federal law. As your Honor is well aware, 364 continued in 1978 what had long been a tradition certainly as far back as 34, the 34 Act, and, again, the 37 Act, and then the Chandler Act, of certificates of indebtedness being issued by states, and it is very clear that as a matter of federal law, a Bankruptcy Court can issue and authorize liens that are prior to other liens, and it is a federal question within your powers under Section 364, and that is the foundation of what we seek and not to comply with the Gaming Board. Actually, your Honor, there is no statute governing income taxes either, and in this case -- and we are reminded of your Honor's observation that Section 901 included Section 364(c), (d), and (e) for a reason, and it was in recognition that, yes, in fact, municipalities may need to borrow, and it is that authority that we're asking you to grant us.

THE COURT: So your position is that even if state

law prohibits the granting of a lien in whatever property, Section 364 authorizes the Bankruptcy Code to allow the debtor to grant such a lien?

MS. BALL: We think it provides independent authority, and I'm not sure that anyone has established that it's prohibited, your Honor, at least no evidence in this hearing that state law prohibits it, but we do think that the position is that we're asking for it to be authorized as a matter of federal bankruptcy law.

THE COURT: Any cases on that?

MS. BALL: No, your Honor, just the long history of the certificates of indebtedness. And, in fact, as your Honor is well-aware, superpriority claims and superpriority liens only exist in bankruptcy and nowhere else and certainly would not be permitted under state law. If your Honor gives me a minute, there may be cases, the reason why I am struggling on that one, your Honor, but if you give me five minutes and we have time, I will get you some. I am told there are cases. That argument was not in the Retirement Systems reply or supplemental reply, so it is not in our papers, but we will endeavor, as I move through the assumption motion, to get those cases.

Moving on, your Honor, I think that Mr. Bennett's point we actually did cover in our reply. He suggests that the context for post-petition financing should be a plan, and

the standards should be confirmation standards. We disagree with both propositions. However, we did point out -- and I would point to paragraphs 49 and 50 of our reply -- that just in responding to objectors' concerns that they should have weighed a plan, Chapter 9 is about the payment of creditors and provision of essential services. We, in fact, point out that, no, that's not the case. The fundamental purpose of Chapter 9 is to provide municipal services, and it's the viability of the city. And in that case, your Honor, we would point you to the Mount Carbon case, 242 B.R. 18, from the District Court of Colorado in 1988, which is cited in our reply, and, your Honor, I would note when Mr. Bennett cites Fano, he neglected to advise you -- and I'm sorry -- it's Bankruptcy Court, District of Colorado, 1999 -- he neglected to advise you that the Ninth Circuit decided four cases that day, the same day that they decided Fano in 1940. Interestingly, Fano was the one case where there was evidence that the irrigation district -- it was not a city; it was an irrigation district -- was eminently solvent, had the power to increase taxes, and did nothing, did not even explore it, and so their plan was not approved. However, as the three cases that are discussed in Footnote 10 on page 25 of our reply, decided three other cases that day, all of them the plans were approved, so I think we have to look at Fano in the context of its unique facts, your Honor, which are that

you had a very solvent situation where there was no evidence that they had attempted to increase taxes in the face of evidence that they could afford to, and certainly in the three companion cases decided that day written by the same circuit judge he went the other way in the other three cases.

With that, your Honor, perhaps we can move on to the approval of the forbearance and optional termination agreement, which, your Honor, we seek two things, your approval under Section 365 to assume the forbearance agreement, and implicit in that, your Honor, is the settlement of claims and the allowance of the secured claim of the swap counterparties in the amount of 165 million. We and Ms. English, Mr. Gordon, Mr. Goldberg see things very similar. These are litigable claims, and they may, in fact, be litigated. They have one advantage, however, that my client does not. The emergency manager has to live in the -- has to live in the real world of providing services to the residents of Detroit every day, and he has to address -- we thought of it almost, your Honor, as the missing third column in Ms. English's PowerPoint. She assumed that we would win, and we would hope if we sued we would win, but she didn't address what happens if the city loses, what would be the real impact, and yet that possibility and those consequences were things that the emergency manager had to consider because, in fact, he would have to live with it, so I would

think, your Honor, that the luxury of litigation -- and I don't use that phrase lightly because we have all invested somewhat heavily into what the prospects for litigation is here, and I would like to move on to offer some of our observations which tend to suggest that no outcomes are certain, no outcomes are near certain, and no outcomes are quick.

Certainly the issues regarding the validity of the COPs and swaps were reviewed. We have excerpted for your Honor's benefit the city exhibits that really focus on the service corps, and the one -- two of them, in particular, may be of interest to you, your Honor. Those are the transactional documents, which are Exhibits 120, 121, which are the service contracts themselves as well as the offering circular, which is Ambac 404. There is one -- well, actually, there are two -- four service contracts that they cover the obligations to the COPs and swaps. They're not separate. They're really not separate provisions. It's the same funding. It's the same provisions. The argument, on the other hand, one, they were authorized. We have ordinances. We have opinions. The opinions are appended to the offering circular that Ambac put into evidence. We have service contracts that say this is not indebtedness of the city. You have no recourse but suing as contract vendor. You are left to the annual appropriation process as opposed

to full faith and credit. It was clearly dealt with as a nondebt obligation of the city outside of Article 34. That evidence supports that proposition; however, in litigation the service corps should be disregarded and Act 34 and its debt limits retroactively applied to declare the swaps and COPs void ab initio. It is true -- and Ms. English is absolutely right -- that this settlement still preserves the right to continue to look at this transaction in a number of ways, 2005, 2006. The only thing it settles is the swaps and terminates the swaps. A lot of other things can be looked at, and, your Honor, the order, I think, is fairly clear on that. We do not -- Ms. English is right. We do not share her view of estoppel. We think the cases, once you get beyond the mid-20th century cases, are -- and your Honor used words differently -- I was somewhat impressed -- illegal versus ultra vires could be a very important difference for estoppel. Intra vires versus ultra vires could be a very important difference. And here, because we're talking about the facts and the representations made by the city regarding the service contracts, your Honor, I think we'd have to take that into account that it's not certain, but I would disagree with Ms. English that it is as easy to just sue the swaps and not have the core common facts, core common documents, core provisions when you're coming to Act 34 not involve the COPs. It seems to us that it is the entire transaction and

structure, and it is not very realistic to think that one could only attach the swaps.

As to issues regarding the validity of the COPs and swaps in terms of the challenges premised on fraud and unconscionability, I think it was quite clear that Mr. Orr understood those claims, evaluated those claims, ranging from -- I think he called it LIBOR price fixing as opposed to LIBOR manipulation, superior knowledge, the ticking time bomb and even the personnel question when former city CFO Werdlow joined the swap bank. Clearly those things are looked at. I also think the downsides to those claims, which involve the duration, difficulty, and fact-intensive nature of any such trial, weighed heavily on his mind.

When it came to issues regarding the validity of the pledge of the casino revenues, they were also reviewed. Again, we would view the role of estoppel here somewhat differently from Ms. English, and the reason we would do that here is because clearly on the finding of the pledge, there were findings of fact by the City Council at a legislative hearing, and those findings of fact are unlike one would say the mid-20th century void ab initio cases which are premised on knowledge of the law. Here there was a finding of fact, and, in fact, your Honor, there was also an opinion by a well-known law firm who opined that the pledge was proper. And in addition to that, of course, we had the letter from

the executive director of the Gaming Commission, who said there were no compliance issues that they saw.

THE COURT: Well, but let me ask this. Is there any Michigan case law that prohibits a city on the grounds of estoppel from asserting the illegality of a transaction?

MS. BALL: Your Honor, there is substantial case law, and it's actually coming up in another litigation before you, that says the only party that has standing to assert the illegality of that position is the state treasurer under Act 34. So, your Honor, I am not aware of cases --

THE COURT: That's a different question. I'm asking --

MS. BALL: I'm not aware of cases of any private citizen where that has been held.

THE COURT: I'm not sure what you mean by "private citizen." My question was is there any case law that prohibits a city from asserting the illegality of a transaction that it entered into on the grounds of estoppel?

MS. BALL: Your Honor, when you're dealing with an intra vires, yes, Highland Park, and when you're dealing with a factual representation, yes. If the city was clearly involved in a misrepresented factual situation, there are cases, your Honor, and they would actually be more applicable to the validity of the pledge of casino revenues perhaps than the Act 34 questions, although I think that disregarding the

service corporations is a bit complicated. So, yes, we do know that there are cases where a city where it was intra vires, which meant a city official went beyond their authority, and where there was a fact-finding where a city was estopped from going forward. There are cases. There are not such cases, your Honor, that I am aware of in the void ab initio area, which is a distinction here.

Your Honor, I wanted to go on to another point that Ms. English made, and I was concerned because she had suggested that the pension obligations were not part of the 2009 ordinances, and, indeed, they were. And, in fact, our next slide highlights the ordinance, which is also in evidence, that talks about the pledge being necessary as incident of the pension funding program, so I think it was in evidence, and it was not something that came out of the clear blue sky, but obviously, your Honor, there are at least two ordinances. There's a legislative hearing here, and there are a number of opinions, so I'm not surprised.

In terms of the issues regarding the special revenues, your Honor, we looked at that. Are casino revenues special revenues? It was studied. I think we were in the camp that there's an issue when you have a definition of special revenues which has some five different kinds of special revenues, only one of which appears to be for a construction project and others of which are very different,

and they include special excise taxes. We were struck by the plain meaning. After all, the Gaming Control Board Act is a 1996 event, and it used the term "excise taxes" entirely independent of whatever might later happen in 2009.

We also were a little confused by Mr. Gordon because we think the argument that we and the banks are making is they are squarely within that plain meaning, and they are squarely within the consensual security agreement arrangement described in 922(a) -- 928(a), which, your Honor, actually -- Mr. Gordon put it up in his PowerPoints -- provides that a lien granted to -- pursuant to a security agreement will continue post-petition. Clearly the collateral agreement is a security agreement, and clearly the banks, if there are special revenues, we have excise taxes that are pledged pursuant to a security agreement, and, your Honor, we're dealing with two very plain meaning arguments.

THE COURT: Mr. Gordon distinguishes between excise taxes and special excise --

MS. BALL: Special excise taxes, your Honor.

THE COURT: -- taxes.

MS. BALL: Your Honor, we can find no case that distinguishes or distinguishes as to use, and even Mr. Gordon ended up using two treatises, and we're not aware of where they have been applied. And, your Honor, we think --

THE COURT: Well, but does the reading you propose

read the word "special" out of the Code?

MS. BALL: I think "special" is back -- we think it's included here because it is on a particular activity. We think the casino revenue taxes are special because they are an excise tax on a particular activity, and because they're on that particular activity of gaming, we think they are within the meaning of special. We don't read it out.

THE COURT: Isn't an excise tax, by definition, a tax on a particular activity?

MS. BALL: Your Honor, I think that the legislative history tells us that it does include those, but, your Honor, I think that's as close as we can get to is reading the words "legislative history" in the statute, and I don't think we're asking you to read the word "special" out, but I do think that one has to be incredibly cognizant of the various types of secured debt that are currently outstanding not only as special excise taxes but as we have here, state intercept secured loans and many other types. This should not be construed, we would think, your Honor, to prohibit a city from financing itself.

THE COURT: Can you give me an example of an excise tax that is not a special excise tax?

MS. BALL: Sure. Smoking, tobacco. I think taxes on gasoline and cigarettes are often considered excise taxes, and I think they're pretty general. It's not a particular

activity. And if you think about how they're used, I think they are different. That's not a municipal activity.

THE COURT: If it's in relation to an activity, it's special, but if it's in relation to a product, it's not?

MS. BALL: I would think, your Honor, if it's not a particular product for a particular use in a city within a municipality, yeah, I think we're having trouble if we're talking about a general product that goes beyond a municipality. And those are called excise taxes, and, in fact, your Honor, they exist in 507 where we use the word somewhat differently.

Your Honor, we also were confronted by the opinion of a fairly well-known major law firm that did apply, and, of course, this opinion made it into evidence through the Retirement Systems.

THE COURT: What's the relevance of it, though?

MS. BALL: Your Honor, it's something you -- it's a fact that you would have to overcome. It would be something that Mr. Orr, as emergency manager, considered. He had to consider the views that were considered at the time if he was now going to attack them and rethink them, and --

THE COURT: Well, but if the question --

MS. BALL: -- he couldn't just disregard it.

THE COURT: If the question is a question of law, what difference does it make that some lawyer expressed an

opinion on it at an earlier date?

MS. BALL: Your Honor, I think it's a matter of diligence. If it is something as we've had, we can demonstrate through the colloquy we've just had as to what does the word "special" mean, then I think one would do diligence and see what other experts in the area have said, and this would fall into that category of diligence. He did look. He should look, and, in fact, those who would be --

THE COURT: So its weight depends on its persuasive value?

MS. BALL: I think so, your Honor --

THE COURT: All right.

MS. BALL: -- as much as a treatise if one would think about it --

THE COURT: All right. All right.

MS. BALL: -- certainly not less. If we were to move on, your Honor, I think that in evaluating the litigation, the emergency manager had to reconcile the safe harbors and what they would mean here. You've heard from the banks earlier today somewhat what the difference means between void and voidable, and, in fact, we have a very different view. We think that it was an illegal dividend in Contemporary Industries in the Eighth Circuit. The question before Judge Gonzalez was also an illegal dividend. I think we have cases now on the non-Bankruptcy Court issues that you

raised with the banks and with Mr. Ellenberg when you asked about this. Right now we do have two cases going neck and neck in the Seventh Circuit. Your Honor may recall SemCrude, which was a case in Delaware, and we have Bettina White as the trustee of SemCrude bringing a case post-Chapter 11 as the litigation trust to avoid matters, and, in fact, she is being -- her actions were totally disallowed as being preempted by the safe harbors. We have another case pending, your Honor, and that is the Tribune case, also a litigation trust, also seeking to move post-confirmation of a Chapter 11 plan to avoid payments that clearly everyone agreed that during the bankruptcy were safe harbored. That one is on appeal, and the appeal has not yet been decided, so, your Honor, I think there is still a question not only as to the void and voidable and the doubt cast on Enron, but in answer to your question, which is where are we going with state law, what if we tried to go to a different forum -- as you know, in fact, the city, before the safe harbors attached, did go to state court and did seek relief and, in fact, had very seriously considered the importance of not being in bankruptcy to avoid those safe harbors. Your Honor, the cite for the SemCrude case is White versus Barclays Bank at 49 B.R. 196. It's in our reply. And the Tribune case, which is on appeal in the Seventh Circuit going the other way, is also in our reply, your Honor. If you give me a minute, I can

find you that one, but it is on appeal to try to reverse that ruling and be able to go forward and attack in state court what it could not attack in the Bankruptcy Court. Moving ahead --

THE COURT: Well, but from a -- apart from the case law, from the standpoint of just pure logic --

MS. BALL: Okay.

THE COURT: -- why should the safe harbors be permitted to protect a transaction that under state law is void ab initio? It's as if under state law the transaction did not exist.

MS. BALL: Your Honor, there is a concern -- and I think Mr. Ellenberg tried to express it, and I think the legal term for it is coming through most strongly as preemption in the Second Circuit's ruling in Enron, which is that state law has to give way to federal law where there is an area where Congress has decided to act and exercise its bankruptcy power. And when it comes to contracts that are traded not only across the country and across state lines but globally, Congress intervened for many -- I think the term is often qualified financial contracts, your Honor, settlements, margin payments, swaps, forwards, commodity contracts, on the theory that this is not an area that states should be intervening in. These products operate in a market which as 2008 -- as fast as the world melted down when we all saw how

interconnected we were, that it should be preempted, and, in fact, that's what's suggested by Enron and again by Judge Easterbrook's affirmance of the Lancelot case. In fact, we even have that view being taken when you have a clear Ponzi scheme as in the Peterson case in the Seventh Circuit, but the logic is really that Congress has spoken. This is an area that's critical to systemically important financial institutions because of their interdependence, and they have acted and do not believe that states should be meddling in this area. Do we have a case that says, yes, we have a void ab initio under --

THE COURT: Why is it meddling -- why is it meddling when you're talking about state control over a municipality and what it can and can't do?

MS. BALL: Because we actually have a swap which goes far beyond that municipality and probably involves multiple other parties beyond that municipality. Your Honor, we would have to go back to was there anything -- and I think we're getting back to was this voidable, was it void ab initio, and what does illegal really mean because it's not clear to me that illegal is one or the other when you say that, and I would think if we do have to litigate this -- and we may -- and, in fact, we may -- that we would be agreeing with Ms. English as this morning that this is an issue that is undecided. It is still undecided, your Honor, but it does

put us in the position of the city, when you think of complexity, duration, and expense, of evaluating how much time are we going to have to spend -- how much time and money are we going to have to spend litigating over whether or not we have the right to litigate? And I think that certainly to that extent it was a very valid concern for us because it is unclear. No one could guarantee that those casino revenues would be safe, and because, as I stand here now, I don't know whether we will be seeking an injunction from your Honor -- we believe, yeah, maybe there are arguments, and we were prepared through Mr. Hertzberg and his firm to go after them, but, your Honor, how much time and how much appellate -- not even on the substance, just figuring out do we have a right to litigate before we even get to the substance, and that was a concern in this context for the city because there is no doubt here -- and I think Mr. Buckfire may have made it too clear -- that in looking at the litigation, it had to be reconciled with the needs of the city, and what were really realistically available options for the city at the time, and what did the city do to preserve its rights should circumstances change going forward, and perhaps we should turn to talking about that with your Honor's permission.

THE COURT: Sure. Go ahead.

MS. BALL: Thank you. Turning to the next -- I think this is the slide that, yes, Ms. English is right. I

do view this as a litigation forecast, and I do view it that way because I have seen no evidence of a loan to fund litigation, and I've seen no evidence that anyone would make a loan when what Mr. Orr testified as 20 percent of the city's revenues are under a tremendous cloud. It seems pretty speculative to me, but what does seem rational to us is to look at if we could hope for the best and maintain the status quo during litigation, what would it look like, and we did not think while we were litigating over 20 percent of our revenues that it was feasible to get a loan, and no one has come forward with any evidence to the contrary, that even that put us in a very delicate position, not impossible, not impossible, your Honor -- nothing is impossible -- but very delicate. In fact, Mr. Malhotra testified -- and your Honor may recall that you qualified Mr. Malhotra as an expert twice, once in the field of financial analysis and once as to his expert opinion on cash flow analysis, and, your Honor, he shared with us without the DIP loan if we didn't obtain financing and we had the status quo, that we were in jeopardy as early as March. He talked about what I called the hard deck, the 50 million operating capital requirements, that that's in jeopardy even earlier, and he reestablished Kevyn's concern and leveled the emergency manager's concern about the hard deck at 50 million. It's interesting, your Honor, that he had these concerns, and this is our cash, and this is

where our cash stands. And if we go back to Mr. Malhotra's chart, with the benefit of having, thanks in part -- large part to your Honor's ruling on August 28th, with having the casino revenues for June, July, August, September, October, November, December -- that's $77 million we otherwise wouldn't have had, and this is still where we would be, so, your Honor, I don't think it can be taken lightly, and I do think that that was much on Mr. Buckfire's mind. We had a lot of back and forth about whether or not -- what did Mr. Orr do, what did he think, and, in fact, he would tell us that he had a very significant concern if he didn't step in and do something that this situation would quickly get out of hand. In fact, I think he testified that he considered doing nothing, and he determined that that would be fairly catastrophic because the city was running out of money. I'll get to the point made by Ms. English because perhaps June was a pinch point, which is what she has suggested, but for cities whose income is cyclical, there are always pinch points, which is why we want the DIP financing for working capital, as Mr. Buckfire testified. So it was very much on Mr. Orr's mind, and it's interesting that no objecting party has offered any rebuttal evidence with respect to financing litigation or moving forward.

We actually, your Honor, did have the experience, remember, of the casino revenues being trapped for a minor

period before we were in bankruptcy, and we did have to sue to get them back, so the concern was real, having had the Syncora experience. In fact, Mr. Orr further testified that if you were unable to get casino revenues, the consequences would be quite severe, and here, your Honor, is what he had to think about if the city lost, the third column not in the Ambac chart. The single largest most secure source of revenue would have been imperiled. Your Honor, I think that that was very important to him.

And, your Honor, I would just like to point out for the moment that Ms. English has talked about us rushing and rushing to June, and I wanted to spend just a few minutes on that because, as your Honor is aware -- let's go back -- June, low point for the city, no doubt -- in fact, dire was the testimony -- did the deal, agreed in principle in a week, took a month to document it, but, your Honor, what Ms. English neglected to point out to you is that there was a very pressing need for protection for the city. The Syncora experience totally demonstrated that we needed protection. We needed some assurance that these revenues would be available to the city, but that wasn't turtle up. We had an escape valve. And, in fact, City Exhibits 50 to 54 confirm that we kept that escape valve alive until we had another one. Your Honor, by that I mean that we had a right to walk should we perceive the benefits of this agreement were no

longer necessary for the city. We kept that alive first through fifth amendments, which took us to September 23rd. Thereafter, the forbearance agreement itself, which is City Exhibit 18, Section 1.3(m), for reference -- your Honor, we had a right to walk because we failed to get an order within 75 days of filing, so until December 24th when we committed before the mediator to not litigate and stay with this deal until after 1-31 if your Honor were to fail to approve it, we did have an escape valve, and we did go back, and if situation changed, there was a way to do this. I would suggest to your Honor that the fundamental key for us is we agree that the challenges are litigable. I think we disagree on the difficulty of establishing the claims, and we disagree on the timing and expense it will take, but footnote, your Honor, we do not agree that rushing is deciding anything ahead of the plan. The city's residents should not have to wait to stabilize the city's finances.

We also think it is fairly important to your Honor that you can determine that the issues before you right now are properly before you. We are asking you to approve assumption of the forbearance agreements -- agreement, not the swap, not the service contracts. They're all contracts with different parties at different times. It is an executory contract, and we think, your Honor, there is no doubt in our mind -- and we would urge that the cases would

suggest that there should be no doubt in your mind -- that matters regarding the assumption of a contract and a settlement under 9019 -- and I can focus on the post-Stern cases if that would be more helpful -- are clearly properly before you as is the allowance of a claim, as is the adjustment of debtor-creditor.

Your Honor, we think that your decision on the eligibility motion has confirmed what the cases tell us, which is if our matters are properly before you, then you have the ability to decide them, and that's what we are asking you to do here. There is no doubt in our mind, your Honor, that 365 and assumption is within your core authority. We think that the Sixth Circuit has recently affirmed that in a case called In re. G.A.D., Inc., 340 Fed. 3d 331, and that was just this fall. Similarly, the Seventh Circuit has said that rejection of a contract is clearly core. It's 365 even though it involves state law issues, and that was decided -- that was affirmed by the Seventh Circuit in 2012, and that is Lakewood Engineering & Manufacturing Company, and it is reported -- excuse me, your Honor -- at -- it's reported in a lower court decision, 49 B.R. 306, and the particular point I would urge you to look at is on 312. It was later affirmed by the Seventh Circuit in 2012, and cert was denied by the Supreme Court, 133 Supreme Court 1790.

Similarly, your Honor, the Third Circuit has had two

cases post-Stern where 9019 settlements affecting state court were found to be core. One was New Century TRS Holdings, Inc., which is 213 Westlaw 5944049. Third Circuit decided that on November 17, 2013. And its second decision is Lazy Days' RV Center, Inc. at 213 Westlaw 3886735, which was also decided by the Third Circuit in 2013.

Interestingly, there's another one, your Honor, on the extent of liens and your power to decide state law issues regarding the extent of liens, their priority and their scope and termination, and interestingly, your Honor, that's an art case. It's In re. Salander O'Reilly Galleries, 453 B.R. 106, and it's in the Bankruptcy Court in New York, 2011, and would be later affirmed by the Southern District. We think, your Honor, that all parties here have agreed that the issues to approve these 365, 9019 include the enforceability and validity of the forbearance agreement. In fact, one of Syncora's lead cases, In re. III Enterprises, Inc., which was affirmed under the name Pueblo Chemical, actually holds, and I quote, "The issue of existence and enforceability of the underlying contract are threshold issues, the resolution of which is absolutely essential to adjudication of the motion." Your Honor, that case distinguishes Orion. I would distinguish Orion on multiple grounds here. The facts in Orion, as you may recall, your Honor, the underlying contract was between Showtime and Orion. There was a default, and

Showtime was enforcing the default. There are no defaults under the forbearance agreement. We have no problems with the forbearance agreement, and that's the agreement that we're talking about, and, in fact, because of that, knowing that, in fact, there is a contract, it has become a critical predetermination.

We also thought it would be interesting to your Honor to think about another case that was affirmed by the Third Circuit. Mr. Perez brought SportsStuff to your attention. SportsStuff is reminiscent of the channeling injunction cases, but they got it wrong there, but that's not the proposition I would like you to think about with SportsStuff. What I'd like you to think about is let's first start with a case called RNI Wind Down Corp., 348 B.R. 286, Bankruptcy Court, Delaware, 2006. That court was called upon to determine whether an objector to a settlement who asserted a consent right -- whether or not their consent right was necessary and whether, in fact, it was legitimate. That court determined that the objector was not a necessary party to amend the settlement agreement, and consideration of Rule 9019 in the face of adjudicating that objector's consent rights more or less was a core proceeding. That decision would be affirmed by the Third Circuit at 359 Fed. Appendix 352. Interestingly, if you think about SportsStuff just a little bit differently, there you had objectors to a

settlement -- you know, a channeling injunction wasn't under plan the way we usually think about it -- and the issue was could the court decide whether or not those objectors had rights and should pay attention to it, and you know what? That's exactly what it did. So in terms of your ability to reach the decision, SportsStuff would suggest that, yes, you can, and, yes, you should. Similarly, RNI Wind Down, yes, it is within your power to do this, your Honor, to figure out whether these consent rights and to determine that the forbearance and optional termination agreement is a valid and enforceable contract and that that's all core. There's no doubt in our mind -- and this gets to another point raised by Mr. Perez -- that settlements always have collateral consequences on third parties. There are cases to that effect -- multiple cases to the effect. Allowing a secured claim by definition adjusts debtor-credit relationships. I would point out here, however, your Honor, that we were able to resolve the reservation of rights objection that was made by the ad hoc COPs holders represented by Mr. Tom Mayer and that that provision was added to the order, which was filed with your Honor before we started this hearing and, in fact, read into the record on one of those early days by Mr. Mayer. So, your Honor, we think they're core. We think they're appropriately here. We think they are incredibly contract centric. They are legal. There is no ambiguity. There is

just interpretation. And with that, your Honor, I would recommend that you might take heed of an admission by the insurers. In fact, the insurers admit the express terms of the optional early termination provision did not require their consent, and that's in paragraph 23 of the amended statement of stipulated facts.

Your Honor, it's also very clear that 2009 changed the world, and with that, your Honor, I would turn to the optional early termination provision. We've excepted the one -- excerpted the one that's between UBS and GRS. As you know, there are four amended swaps schedules, one for GRS, one for police and fire, one for UBS, one for Syncora -- I mean one for UBS, one for BAML. Here's the optional termination provision, no insurer consent. The confirmation would have it. 2009 did change the world, but let's take a minute and think about what Mr. Perez said of -- when I think of his telling us that it's an end-run argument, almost ironic in some respects because he's saying, you know, the COPs are valid, the swaps are valid, the service corps are real, it worked for that purpose, but we should disregard the service corps when it comes to the swaps and the optional termination, and we should construe it as an end-run. Your Honor, this is not a situation where people were not represented by counsel. This is a contract between extremely sophisticated financial parties. They knew what they were

doing. And I think that the service corps are different until someone establishes to the contrary from the city and that this is exactly what was contemplated is that the service corps would not pay them and the service corps are not paying the swap counterparties -- whoops -- the city is. In fact, your Honor, I think it was so clear -- and you and I have had this discussion once before -- that in that fateful summer, that June 26 of 2009, the insurers would consent to the optional termination rights. Your Honor, this is just the very first paragraph of the waiver and consent of insurer, in this case, Syncora, and what we've highlighted, your Honor, is the exact same amended schedule that I just reviewed the optional termination provision from, and you will see that that amended schedule is Romanette iv in this paragraph, and there is an express consent to it.

Your Honor, I think it is also disappointing, maybe a little ironic -- I guess perhaps I am being too overly sensitive. One of the things we kept hearing on closing is, well, the city -- maybe it should just do nothing and it should continue funding, and we actually heard it from Mr. Perez that FGIC will suffer harm. The harm FGIC suffers is if the city doesn't continue paying the most expensive piece of debt it possibly has, that FGIC will be harmed. FGIC is a very sophisticated party, and I assume Syncora would join FGIC in these arguments. It has a separate insurance policy

from the COPs from the insurance policy it had from the swaps, and if, in fact, it would be harmed by the termination of the swaps, which it consented to -- and we think it's clear that they did consent to it -- why should the city and its residents be tasked with protecting Syncora and FGIC? Heaven sakes. We would think that they would be able to go out and buy their own replacement swap once this swap is terminated. They consented to it. If they'd like swap protection, the markets are there. They're free to go. I don't see why the residents should be delayed or the city should be burdened with protecting them against their own insurance contracts.

Moving on, your Honor, I think that the city has demonstrated that the settlement with the swap counterparties which allows a secured claim for 165 million satisfies the Bard test. As I said, we agree it's litigable, and, in fact, they may yet be litigated. Of the remaining ten objectors, eight are potential litigating parties. Many are involved in other pending litigations before you. The fact that no one would give you a number they would accept other than I respect Mr. Goldberg for his answer is not surprising to us. It's difficult to number, and I think the real issues if we continue through the Bard factors are the difficulty, if any, to be encountered in the matter of collection. Everyone erases that, your Honor, but you asked us to think about in

the context of that Bard factor the strength of the secured position and what it would take really to undermine it, and in this one, your Honor, we did look at the position and the city's ability to sustain litigation to attack it. This is one of those things where collection became survival, would we live to collect and how much and who would take it up and who would benefit and who would be -- what would be sacrificed in order to get there. I guess the analogy here is, your Honor, even if the operation were to be a success, there had to be a concern, and we think it does fit into the second Bard factor, that the patient could die on the operating table despite the operation's success.

In terms of the complexity, expense, inconvenience, and delay, your Honor may recall that Mr. Orr testified that he estimated costs -- Ms. English reminded us this morning -- at roughly a million a month or six to twelve million a year. That's expensive. As to duration, I think he estimated that it would be a different duration of months between the fraud claim advocated by Mr. Goldberg and some of the others, but the full appellate prospects he has certainly suggested and we would agree and urge your Honor to consider would take far longer than six months. And that cloud over this asset, 20 percent of the city's revenues would continue.

I have adjusted the fourth Bard factor, your Honor, because I think in Chapter 9 it's important, and I guess this

is where I and Mr. Bennett would part company one more time. Chapter 9 is about restoring viability to municipalities. It's about adjusting debt so they can provide services to their residents, and I think the cases on that are pretty clear, and we went over some of them that are found in paragraphs 49 and 50 of our reply on the financing.

If we just want to take a moment, we used to have objection, wait to see if we have the dollars to reap the discount. Those objections are gone. Wait for the retiree committee to weigh in. Well, they did weigh in. They're supporting this motion. We have then the remaining group, your Honor, and we had a lot of more information, more discovery. Well, there was more information, and there was more discovery. In five months people could learn a lot. And now we're left with two kind of camps of objectors, those who feel that given the strength of the claims, that the deal does not reflect the strength of the claims against the banks, but, as I think you heard from the banks this morning, it's the banks and the insurers versus those who are arguing it's really a matter of consent and the powers of this Court. But, your Honor, it is uncontroverted that this settlement will reduce net debt. Right now that debt, your Honor -- we'll get there in a minute, but it's going to reduce it by that discount and that linear equation, speculation, unsupported -- totally unsupported speculation about 78

percent still doesn't controvert its reduction in net debt. And, your Honor, as we know, interest rates have gone down all this week since -- last week since Janice Yellen's confirmation, so you can imagine -- and, in fact, I know what's happened to our swap termination costs, and I would suggest, your Honor, that in light of the interest rate moves and the LIBOR curve moves, which we'll come to in a minute, that it is clear there is going to be a reduction in our net debt. It should be a substantial one.

What is also crystal clear is that this deal will substantially improve the cash flow of the city. Your Honor may recall that when the post-petition financing was still at the 350 level, the cash flow savings were 33 million a year. They obviously are going to be improved by the improvement of the sixth amendment and the improved deal even beyond that, so there's no controverted evidence that this will clearly improve the cash flow of the city. It will give --

THE COURT: I can give you about five more minutes.

MS. BALL: Thank you, your Honor. I think I'm kind of done other than the next slide, your Honor. We have met -- we've met our burden, I think, under 9019. The range of reasonableness I think is the test that we would urge your Honor to consider. And, your Honor, in the context that there's clearly a policy in favor of settlement, as was recognized by these same cases, your Honor, I wanted to do

one last, which is the LIBOR curve, and if your Honor would permit me, and then I'm done.

Your Honor, the LIBOR curve itself is a reflection of the market's view of interest rates. By the way, that curve changes constantly. The objectors have presented no evidence that interest rates can be predicted with any degree of certainty. In fact, the city's experience would suggest that it has suffered mightily from trying to take away and bet on interest rates. We also have the testimony, contrary to Ms. English's representations, that Kevyn Orr did, in fact, as the emergency manager, during the mediation, call his investment bankers several times to try to get an idea of what was going to happen to interest rates during the coming weeks, so he did inform himself as to what would happen. And, your Honor, if you want some understanding of what Miller Buckfire knew about the LIBOR curve, I think they had a very interesting exchange, Mr. Doak did, which I've highlighted for you, with Mr. Arnault on behalf of Syncora, and I think that Mr. Doak was quite clear that they move a lot, and it is, in fact, the market's expectation of what will happen to interest rates. And, your Honor, I don't think anyone can predict interest rates accurately, never mind predict movements in the LIBOR curve, and with that, your Honor, we would ask respectfully that you grant us an order authorizing the post-petition financing and authorizing

the assumption of the forbearance and optional termination agreement.

THE COURT: Thank you.

MS. BALL: Thank you.

THE COURT: I would propose, counsel, to reconvene this Thursday, the 16th, at 2 p.m. for the Court's decision. Any objection to that? All right. Hearing none, we'll be in recess. What?

MR. PLECHA: Can I just make one point of clarification, your Honor? Ryan Plecha on behalf of the retiree association parties. We have not --

THE COURT: If it's a matter of clarification, yes. If it's a matter of argument, no.

MR. PLECHA: It is not It's just pure clarification. The retiree association parties, who were the party that said the Court should wait and see for the Retiree Committee's response, still has a live objection, and it is objecting to both the swap and the forbearance agreement --

THE COURT: Thank you, sir.

MR. PLECHA: -- and the DIP. Thank you.

THE COURT: All right. We'll be in recess.

THE CLERK: All rise. Court is adjourned.

(Proceedings concluded at 4:01 p.m.)

INDEX

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett   January 17, 2014

Lois Garrett